



Case Western Reserve Law Review

Volume 66 | Issue 2

2015

The Emerging Eighth Amendment Consensus Against Life Without Parole Sentences for Nonviolent Offenses

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THE EMERGING EIGHTH AMENDMENT CONSENSUS AGAINST LIFE WITHOUT PAROLE SENTENCES FOR NONVIOLENT OFFENSES

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INTRODUCTION

As the nation moves away from the policies that built a criminal justice system bent on mass incarceration, it is an appropriate time to reassess a sentencing regime that has doomed thousands of individuals convicted of nonviolent offenses to die in prison. Over the last thirty years, those policies have resulted in more than 3,000 offenders across the country receiving life sentences without the possibility of parole when they were convicted of a nonviolent crime. While it seems clear to many today that this harsh punishment is inappropriate for offenses that involved no physical harm to other people, the individuals serving these sentences continue to face life and death in prison. The Eighth Amendment offers these offenders an opportunity to demonstrate the unconstitutionality of their punishment to the Supreme Court—the institution in the best position to redress these excessive sentences of a bygone era.

This Article analyzes the claim that there is a national consensus against life without parole sentences for individuals convicted of nonviolent offenses. First, it defines the problem, exploring how and why some offenders received life without parole sentences for nonviolent crime. This entails a look at the historical development of a series of harsh sentencing policies that made nonviolent offenses punishable by life without the possibility of parole. The historical developments are then traced through to current times to explain the seismic shift in how leaders in all three branches of government approach punishing low-level and nonviolent crimes.

This Article situates the punishment in the Eighth Amendment context. How have the Supreme Court’s previous Eighth Amendment rulings framed the relevant constitutional questions? And how can a change in the way the Court considers the link between the nature of the offense and the challenged punishment create new possibilities? This Article explores how treating individuals sentenced to life without parole for nonviolent offenses as a discrete category based on the nature of the crimes can alter the Eighth Amendment framework that the Court will use to determine the punishment’s constitutionality. The unfavorable “gross disproportionality” cases that have previously been

considered by the Court do not need to govern the claim and, therefore, do not foreclose the possibility that the Constitution itself prohibits these sentences.

After exploring how to understand the constitutional claim in a way that brings the Supreme Court's categorical approach to bear (rather than the gross disproportionality approach), this Article assesses the factors the Court considers in its consensus-based categorical test. It sets out, and then evaluates, the various indicators of consensus upon which the Court relies: the number of jurisdictions that legislatively authorize a punishment; the number of sentences actually imposed; and the degree of geographic isolation. It also evaluates the various considerations that assist the Court in making an independent judgment of the punishment. Ultimately, based on binding Eighth Amendment precedent, sufficient evidence is available now to enable the Court to strike down life without parole sentences for nonviolent offenses. In other words, there is an emerging consensus that the Court should recognize.

I. HOW IT BECAME POSSIBLE FOR SOMEONE TO BE SENTENCED TO LIFE WITHOUT PAROLE FOR A NONVIOLENT OFFENSE

The 1980s and 1990s saw the United States transform into the world's most carceral society,¹ in large part due to the dramatic expansion of state and federal government sentencing policies that imposed stiff mandatory minimum penalties for drug offenses and crippled the use of parole.² Among the millions of people that have subsequently been caught in the net of mass incarceration is a group of offenders sentenced to die in prison for nonviolent crimes. Just over 3,000 people are currently serving life without the possibility of parole³ sentences in

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1. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (describing how U.S. policies, including the "War on Drugs," increased incarceration rates).
 2. See, e.g., WILLIAM J. SABOL ET AL., URBAN INST. JUSTICE POLICY CTR., *THE INFLUENCES OF TRUTH-IN-SENTENCING REFORMS ON CHANGES IN STATES' SENTENCING PRACTICES AND PRISON POPULATIONS* (2002), http://www.urban.org/research/publication/influences-truth-sentencing-reforms-changes-states-sentencing-practices-and-prison-populations/view/full_report [<http://perma.cc/8D6A-2N6X>] (analyzing in-depth the effects of sentencing policies in various states).
 3. All references to "life sentences" within this Article refer to life sentences *without* the possibility of parole. In some jurisdictions, it is possible to receive a life sentence with the possibility of parole after some amount of time. Those types of life sentences are beyond this Article's scope.

the United States for crimes that did not involve an act of violence.⁴ These people are serving their sentences for property crimes, drug offenses, financial crimes, or public-order offenses.⁵

The number of people serving life without parole sentences for nonviolent offenses began to climb in the late 1980s when mandatory minimums for drug and gun offenses gained currency and parole was largely abolished in the federal system.⁶ The vast majority of people serving life without parole for nonviolent offenses in 2012 were sentenced in the federal system: 2,074 of 3,278 nationally or sixty-three percent.⁷

After setting out a definition of nonviolent crimes, this Part will detail the federal government's implementation of harsh sentencing policies for drug offenders in the 1980s and '90s, which resulted in many nonviolent life without parole sentences, and explore the climate in which those laws were passed. It will also identify the small number of other jurisdictions that have sentenced people to life without parole for nonviolent offenses and the laws by which they have done so.

This Part will also explore the recent shift away from this harsh sentencing regime. Legislative bodies, prominent political figures, and the President himself have begun to reject life without parole for nonviolent offenses as "an unnecessarily harsh sentence imposed in crueler times."⁸ States are adjusting their sentencing schemes to divert nonviolent offenders out of prison and to place drug offenders into treatment.⁹ Legislation currently pending before Congress would eliminate life without parole for people convicted of nonviolent offenses.¹⁰ The vast majority of states have abandoned the policies and practices that result in nonviolent life without parole sentences, and the remaining sentences are concentrated in just a handful of jurisdictions, signaling waning support for the punishment nationally.

4. JENNIFER TURNER & WILL BUNTING, AM. CIVIL LIBERTIES UNION, A LIVING DEATH: LIFE WITHOUT PAROLE FOR NONVIOLENT OFFENSES 20 (Vanita Gupta et al. eds., 2013).

5. *Id.* at 19.

6. *See* SABOL ET AL., *supra* note 2, at 9–11 (detailing sentencing law and prison release decision changes in select States).

7. TURNER & BUNTING, *supra* note 4, at 22–23.

8. *Alli-Balogun v. United States*, No. 92–CR–1108, No. 13–CV–1108, 2015 WL 4273786 (E.D.N.Y. July 15, 2015), at *1 (discussing opinion on resentencing).

9. *See infra* Part I.D (examining changing attitudes toward sentencing policies).

10. *See infra* Part I.D.3 (examining the pending legislation).

A. *Defining “Nonviolent” Offenses*

This Article relies heavily on a groundbreaking report that the American Civil Liberties Union (ACLU) published in November of 2013. The report, titled “A Living Death: Life Without Parole for Nonviolent Offenses,” provides a thorough factual assessment of the issue, including what jurisdictions utilize the punishment and how many offenders are under the sentence.¹¹ Although the factual information contained in the report was compiled more than two years ago, it remains the most comprehensive, reliable, and accurate publicly-available source.

The ACLU report defines crimes as nonviolent if they “do not involve the use or threat of physical force against a person.”¹² Along with obviously violent crimes such as murder, attempted murder, manslaughter, sexual abuse crimes, assault, and robbery, the ACLU includes certain weapons offenses such as unlawful discharge of a weapon as violent crimes.¹³ Moreover, though certain sex crimes, such as possession of child pornography, do not involve an act of violence against another person, the ACLU has excluded all sex crimes from the data it collected on the grounds that sex crimes inflict “a kind of harm grave enough to set them apart from other nonviolent offenses.”¹⁴

In coming to this definition, the ACLU notes the inherent difficulties involved in parsing the “unpredictable and haphazard” statutory and judicial classifications, some of which extend violent crime to the “*risk* of force against the person or *property* of another.”¹⁵ In certain jurisdictions, offenses such as burglary of an unoccupied dwelling or obstruction of justice are classified as violent crimes.¹⁶ The ACLU dismisses these “inconsistent and overbroad” definitions of violence, as do we for the purposes of this Article.¹⁷

Critically, the ACLU report’s definition of violent crime does not include drug offenses. Despite the conflation of drugs and violence in much of the rhetoric that surrounded the promulgation of mandatory minimum sentences and habitual offender (three strikes) statutes in the 1980s and 1990s,¹⁸ Americans by and large posit drug use as a public

11. TURNER & BUNTING, *supra* note 4.

12. *Id.* at 18.

13. *Id.* at 18–19.

14. *Id.* at 19.

15. *Id.* at 18.

16. *Id.*

17. *Id.*

18. *See, e.g.*, 132 CONG. REC. 31, 329–30 (1986) (statement of Sen. Lawton Chiles) (“And so we find that people, when they are addicted, will go out

health problem rather than a crime problem.¹⁹ For instance, President Obama has recently granted clemency to one hundred and forty-one “nonviolent” drug offenders (including people convicted of trafficking offenses), whom he distinguished from “people who need to be in prison . . . violent criminals.”²⁰ Part of the reason for this shift, along with the evident destruction of communities caused by over two decades of the mass incarceration of drug offenders,²¹ is the emergence of research that rebuffs the idea that drugs and violent crime are inherently related.²² A recent scholarly analysis notes:

[C]rime rates have fallen and violent crime today is at its lowest point since the 1970s, while incarceration rates remain historically high. Violence rates have remained stable, if not lowered, as drug use rates have increased. The empirical connection between drugs and violence is not strong, and at the very least is not clear.²³

and steal, rob, lie, cheat, take money from any savings, take refrigerators out of their houses, anything they can get their hands on to maintain that habit. That, of course, has caused crime to go up at a tremendously increased rate in our cities and in our States—the crimes of burglary, robbery, assault, purse snatching, mugging, those crimes where people are trying to feed that habit.”).

19. See Julie Beck, *Treating Drug Abuse as a Disease, Not a Crime*, THE ATLANTIC (April 2, 2014), <http://www.theatlantic.com/health/archive/2014/04/treating-drug-abuse-as-a-disease-not-a-crime/360042/> [http://perma.cc/M7EJ-KC6X] (reporting that when asked “In dealing with drug policy, should government focus more on providing treatment for people who use illegal drugs such as heroin and cocaine, or do you think it should focus more on prosecuting people who use these types of drugs?,” sixty-seven percent responded “[p]roviding treatment” compared to twenty-six percent that responded “[p]rosecuting drug users”).
20. Peter Baker, *Obama, in Oklahoma, Takes Reform Message to the Prison Cell Block*, N.Y. TIMES (July 16, 2015), <http://www.nytimes.com/2015/07/17/us/obama-el-reno-oklahoma-prison.html> [http://perma.cc/4WSU-ST4V] (emphasis added); see also Sari Horwitz, *President Obama Commutes Sentences of 95 Federal Drug Offenders*, WASH. POST (Dec. 18, 2015) https://www.washingtonpost.com/world/national-security/president-obama-commutes-sentences-of-about-100-drug-offenders/2015/12/18/9b62c91c-a5a3-11e5-9c4e-be37f66848bb_story.html [https://perma.cc/XTF3-JUED].
21. See generally ALEXANDER, *supra* note 1 (describing how U.S. policies, including the “War on Drugs,” increased incarceration rates).
22. See, e.g., Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. 227, 227 (2015) (“[A] causal connection between drugs and violence is unsupported by historical arrest data, current research, or independent empirical evidence.”).
23. *Id.* at 273 (citations omitted).

According to a recent report by the U.S. Sentencing Commission, self-reported crack cocaine use has continued to drop since Congress passed the Fair Sentencing Act of 2010,²⁴ which drastically reduced lengths of sentences for people convicted of crack cocaine offenses.²⁵ A number of state legislatures have adjusted their approach to drug offenders accordingly, choosing to divert lower-level offenders into treatment programs rather than send them to prison.²⁶ Professor Michael M. O'Hear offers a succinct summary of the way in which our thinking about drugs and violence has changed since the passage of War on Drugs era laws:

The world, however, has changed since 1991. The crack epidemic abated and criminal violence more generally plummeted. In public opinion surveys, mentions of drugs as the nation's top problem peaked in 1990 and then fell dramatically. Thus, while the dangerousness of cocaine trafficking in 1991 may have warranted the [Supreme] Court's treatment of the offense as a violent one, the experience of the ensuing two decades may have undermined the factual basis of the Court's decision. Certainly, there seems nothing inherently violent about trafficking in addictive psychoactive substances—for example, one does not think of Starbucks, Anheuser-Busch, or Philip Morris as violent organizations, despite what one may think about the products they peddle.²⁷

The next subpart describes the laws passed during the height of the moral panic about drugs and how those laws swept up a large portion of the people who are serving life without parole for nonviolent crimes in our prisons today.

B. The Federal System

Congress abolished parole through the Sentencing Reform Act of 1984,²⁸ which meant that people convicted of an offense on or after November 1, 1987 would have to serve eighty-five percent of their sentence before becoming eligible for release, and people serving life

24. Pub. L. No. 111-220, 124 Stat. 2372 (2010).

25. UNITED STATES SENTENCING COMM'N, REPORT TO THE CONGRESS: IMPACT OF THE FAIR SENTENCING ACT OF 2010 27 (2015).

26. See generally JUDITH GREENE & MARC MAUER, THE SENTENCING PROJECT, DOWNSCALING PRISONS: LESSONS FROM FOUR STATES (2010) (examining the policies of Kansas, Michigan, New Jersey, and New York).

27. Michael M. O'Hear, *Not Just Kid Stuff? Extending Graham and Miller to Adults*, 78 MO. L. REV. 1087, 1131 (2013) (citations omitted).

28. Pub. L. No. 98-473, ch. 2, 98 Stat. 1837, 1987–2040 (1984).

sentences would never be released.²⁹ Though mandatory minimums were originally introduced by Congress in 1984 for certain drug and gun related offenses,³⁰ it was the Anti-Drug Abuse Act of 1986³¹ that introduced the scheme of mandatory minimum penalties for drug offenses that is still in place today.³² That scheme included the 100:1 crack cocaine versus powder cocaine sentence disparity that was later redressed in part by the Fair Sentencing Act of 2010.³³ Judge Clyde S. Cahill of the Eastern District of Missouri described the frenzied backdrop against which these laws were written:

Images of young black men daily saturated the screens of our televisions. These distorted images branded onto the public mind and the minds of legislators that young black men were *solely* responsible for the drug crisis in America. The media created a stereotype of a crack dealer as a young black male, unemployed, gang affiliated, gun toting, and a menace to society.³⁴

The 1986 Act intended to target medium- and high-level drug traffickers and enhance sentences for repeat offenders.³⁵ Notably, it was

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29. Sentencing Reform Act, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified at 18 U.S.C. § 3551 et seq. and 28 U.S.C. §§ 991–998).
30. See UNITED STATES SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 9 (1991) [hereinafter MANDATORY MINIMUM PENALTIES 1991]. These included what the U.S. Sentencing Commission describes as “substantial mandatory sentencing add-ons or enhancements for the use or carrying of a firearm during a broadly defined crime of violence.” *Id.*
31. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986).
32. UNITED STATES SENTENCING COMM’N, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 23 (2011) [hereinafter MANDATORY MINIMUM PENALTIES 2011].
33. Pub. L. No. 111-220, 124 Stat. 2372 (2010). See MANDATORY MINIMUM PENALTIES 2011 at 32 (“The legislative history of the ratio shows that, in addition to viewing the ratio as consistent with the Act’s general serious/major trafficker penalty structure, Congress predicated the ratio upon its conclusion that crack cocaine was more dangerous than powder cocaine because of its especially deleterious effects on the communities where it was becoming increasingly prevalent.”).
34. *United States v. Clary*, 846 F. Supp. 768, 783 (E.D. Mo. 1994) (citations omitted), *rev’d*, 34 F.3d 709 (8th Cir. 1994).
35. MANDATORY MINIMUM PENALTIES 2011, *supra* note 32, at 24 (“Senator Robert Byrd, then the Senate Minority Leader, summarized the intent behind the legislation: ‘For the kingpins—the masterminds who are really running these operations—and they can be identified by the amount of drugs with which they are involved—we require a jail term upon conviction. If it is their

constructed by Democrats in the House of Representatives seeking to demonstrate their law-and-order bona fides in the face of a 1984 election loss in which they were accused of being “soft on crime,”³⁶ even though the legislation was coopted by President Regan.³⁷ Congress hurried to pass the bill in response to a national hysteria about drug use (including crack cocaine and the death of Boston Celtics basketball star Len Bias from a cocaine overdose).³⁸ A 2011 report by the United States Sentencing Commission noted that “Congress bypassed much of its usual deliberative legislative process. As a result, Congress held no committee hearings and produced no reports related to the 1986 Act.”³⁹ The same report concluded that, in fact, contrary to Congress’s intent to target major and serious traffickers, in practice, “the quantity of drugs involved in an offense is not closely related to the offender’s function in the offense” and that “the mandatory minimum penalties for drug offenses may apply more broadly than Congress may have originally intended.”⁴⁰

first conviction, the minimum term is 10 years Our proposal would also provide mandatory minimum penalties for the middle-level dealers as well.”).

36. Eric E. Sterling, *Drug Laws and Snitching: A Primer*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/snitch/primer/> [<http://perma.cc/VYR8-CDWG>] (“During the July 4 congressional recess, [House Speaker “Tip”] O’Neill’s constituents were so consumed with anger and dismay about Bias’ death, O’Neill realized how powerful an anti-drug campaign would be.”).
37. ANDREW B. WHITFORD & JEFF YATES, *PRESIDENTIAL RHETORIC AND THE PUBLIC AGENDA* 61 (1st ed. 2009) (stating that the Anti-Drug Abuse Act of 1986 created differential mandatory minimums for crack and powder cocaine).
38. Jonathan Easley, *The Day the Drug War Really Started*, SALON (June 19, 2011), http://www.salon.com/2011/06/19/len_bias_cocaine_tragedy_still_affecting_us_drug_law/ [<http://perma.cc/2LLB-SSDG>] (describing how Eric Sterling, former counsel to the House committee that drafted the 1986 Act, recently discussed the central role that Bias’s death played in the passage of the law and the national discussion around it, saying: “Suddenly, the Len Bias case was the driving force behind every piece of legislation. Members of Congress were setting up hearings about the drug problem and every subcommittee chairman was looking to get a piece of the action. They were talking about Len Bias at every press conference and it was all tied together—the Len Bias tragedy and the potency of drugs and this evil that was killing America’s youth. He became shorthand, a high-profile symbol for all of these issues. People were shouting about how crack cocaine was the most addictive or dangerous substance to ever exist, and one lawmaker was calling for the death penalty for some drug-related offenses. It was hyperbole piled on top of exaggeration.”).
39. MANDATORY MINIMUM PENALTIES 2011, *supra* note 32, at 23–24.
40. *Id.* at 168–69.

That the bill created immediate, far-reaching, and drastic changes to the nation's relationship with drugs is underscored by the unprecedented number of mandatory minimums it promulgated.⁴¹ The U.S. Sentencing Commission reported that "[t]oday there are approximately [one hundred] separate federal mandatory minimum penalty provisions located in [sixty] different criminal statutes."⁴²

Historically, mandatory minimums were used for offenses concerning treason, murder, piracy, rape, slave trafficking, internal revenue collection, and counterfeiting.⁴³ In the 1950s, Congress introduced relatively short mandatory minimums for certain drug crimes for the first time. However, these were all but abolished in the following decade under President Nixon.⁴⁴ Nevertheless, the trend towards mandatory minimums for drug crimes had been established and quickly resurfaced in the following decade. These mandatory minimums are undergirded by a belief that drugs and crime are inextricably linked: "The assumption that drugs cause violence is at the core of American drug policy and helps explain why drug convictions increased almost tenfold from 1980 to 1996."⁴⁵

The U.S. government first introduced life imprisonment without the possibility of parole as a possible sentence for certain federal drug offenses in the 1986 Act and broadened life without parole sentences through amendments in 1988 that made penalties for drug conspiracy the same as those applied to substantive distribution and importation/exportation offenses.⁴⁶ According to the Narcotics Penalties and Enforcement Act of 1986,⁴⁷ a person who is convicted under the statute and has one or more prior drug felony convictions will be sentenced to a minimum of twenty years and a maximum of life imprisonment.⁴⁸ An amendment to the Act in 1988 provided that offenders convicted under the statute who were also previously convicted of two or more prior drug felonies are subject to a mandatory minimum term of life imprisonment.⁴⁹

41. *Id.* at 23.

42. MANDATORY MINIMUM PENALTIES 1991, *supra* note 30, at 11.

43. MANDATORY MINIMUM PENALTIES 2011, *supra* note 32, at 22.

44. *Id.*

45. Baradaran, *supra* note 22, at 229–30 (citation omitted).

46. MANDATORY MINIMUM PENALTIES 2011, *supra* note 32, at 25.

47. Pub. L. No. 99-570, 100 Stat. 3207 (1986).

48. 21 U.S.C. § 841(b)(1)(A) (2012).

49. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988).

It was under this Act that the bulk of federal prisoners serving life without parole for nonviolent offenses were sentenced.⁵⁰ Ninety-six percent of federal prisoners serving life without parole for nonviolent crimes in the U.S. are drug offenders.⁵¹

The trend toward long, punitive sentences for nonviolent offenders in the federal system continued under President Bill Clinton. In 1994, Clinton's Violent Crime Control and Law Enforcement Act⁵² conflated drug trafficking offenses with violent crime in a provision that mandated life imprisonment for "violent felons" with three or more serious felony convictions, even though these "serious felony convictions" might include nonviolent drug trafficking offenses.⁵³ In 1998, Congress amended 18 U.S.C. § 924(c) to make it possible for people convicted of possessing or brandishing certain firearms during the commission of a drug trafficking offense to receive mandatory life without parole sentences if the offense is a second or subsequent offense under the statute.⁵⁴ A significant portion of people serving nonviolent life without parole were sentenced under this federal statute. According to data from the U.S. Sentencing Commission on the prisoners admitted to serve life sentences in federal prisons between 1999 and 2011, 588 were sentenced for a nonviolent firearms offense.⁵⁵

As a result of these and other provisions⁵⁶ that were passed in the 1980's and 1990's, the ACLU estimates that as much as 85 percent of

50. See TURNER & BUNTING, *supra* note 4, at 25 (noting that more than a quarter of federal prisoners serving life without parole for nonviolent crimes were sentenced as "career offenders," mostly for drug offenses).

51. *Id.*

52. Pub. L. No. 103-322, tit. 7, § 70001, 108 Stat. 1796, 1982-1984 (1994).

53. *Id.* The bill also encouraged states to adopt three strikes laws—ostensibly for violent felons—and "truth-in-sentencing" laws that required the abolition of parole for violent offenses. However, most states had already adopted such laws or didn't consider the federal legislation a significant factor in subsequently doing so. See Katherine J. Rosich & Kamala Mallik Kane, *Truth in Sentencing and State Sentencing Practices*, NAT'L INST. JUSTICE J., No. 252, <http://www.nij.gov/journals/252/pages/sentencing.aspx> [<http://perma.cc/82EZ-VK58>].

54. Act of Nov. 13, 1998, Pub. L. No. 105-386, 112 Stat. 3469.

55. TURNER & BUNTING, *supra* note 4, at 25.

56. Other examples of mandatory life without parole sentences for nonviolent drug offenses under federal statute include: third or subsequent conviction for manufacture or sale of, e.g., 50 grams or more of methamphetamine or 280 grams or more of crack cocaine, 21 U.S.C. § 841(b)(1)(A) (2012); second or subsequent conviction for manufacture, sale, etc. of, e.g., 50 grams or more of methamphetamine or 1,000 kilograms or more "of a mixture or substance containing a detectable amount of marihuana," *Id.*; third or subsequent conviction for manufacture, sale, etc. of any amount of a controlled substance

the federal prison population that was sentenced to life in prison without the possibility of parole between 1999 and 2011 were convicted of non-violent offenses.⁵⁷

The majority of people serving life without parole for nonviolent offenses in both state and federal systems have been sentenced under the sorts of mandatory provisions that took root during this period: mandatory minimums, habitual offender laws, and penalty enhancements, such as gun enhancements.⁵⁸ Unsurprisingly, jurisdictions that have abolished parole while retaining life sentences for people convicted of nonviolent offenses—primarily the federal system, Louisiana, and Oklahoma—incarcerate the largest numbers of these offenders.⁵⁹

*C. States That Sentence Individuals to Life Without the
Possibility of Parole for Nonviolent Offenses*

Louisiana and Oklahoma have closely mirrored the federal system regarding which type of nonviolent offenses they tend to punish with life without parole sentences. Nonviolent drug offenders make up one hundred percent of nonviolent prisoners serving life without parole in Oklahoma and eighty percent of nonviolent lifers in Louisiana.⁶⁰ Like the federal government, both states give mandatory life without parole sentences to people convicted of certain drug offenses for a third time.⁶¹

to a minor within 1,000 feet of an elementary, vocational, or secondary school or college, junior college, or university; or playground, or public housing facility; or within one hundred feet of a youth center, public swimming pool, or video arcade facility, 21 U.S.C. §§ 860, 841(b)(1)(A) (2012); third or subsequent conviction for sale or possession any amount of a controlled substance in or within 1,000 feet of a truck stop or rest area, 21 U.S.C. §§ 849, 841(b)(1)(A) (2012); third or subsequent conviction for distribution by a person eighteen or older of any controlled substance to a person under twenty-one years of age, 21 U.S.C. §§ 859, 841(b)(1)(A) (2012); third or subsequent conviction of adult who hires, persuades, etc. any minor to participate or assist in any drug offense or receives any controlled substance from a minor other than an immediate family member, 21 U.S.C. §§ 861, 841(b)(1)(A) (2012).

57. TURNER & BUNTING, *supra* note 4, at 24.

58. *See id.* at 39 (explaining mandatory minimum sentencing rules that control life without parole sentences).

59. *See id.* at 37 (describing jurisdictions that retained life without parole sentences for nonviolent offenders after the jurisdiction abolished parole).

60. *See id.* at 23 (classifying nonviolent life without parole prisoners).

61. *See* LA. STAT. ANN. § 15:529.1(A)(3)(b) (2015). Mandatory life sentences will be imposed for a third or subsequent conviction for any drug offense punishable by 10 years or more. Qualifying offenses include simple possession of any amount of any Schedule I substance or a 3rd or subsequent conviction for simple possession of any amount of marijuana, or manufacture or sale of any amount of any Schedule I or II substance. *See also* OKLA. STAT. ANN. tit. 63 § 2-415(D)(3) (West 2015). Mandatory life sentences will be imposed

Both states are among the highest users of nonviolent life without parole sentences, and their statutes make clear why. Louisiana, which, behind the federal government, holds the second highest number of people serving nonviolent life without parole at four hundred and twenty-nine sentences, mandates these sentences for a third or subsequent conviction for simple possession of any amount of marijuana and offenses as minor as purse-snatching.⁶² Other states that provide for mandatory minimums of life without parole for repeat nonviolent drug offenders include Alabama, Georgia, and Illinois.⁶³ Additionally, Oklahoma allows discretionary life without parole sentences to be imposed for some first-time nonviolent drug offenders.⁶⁴

Notably, neither Florida nor Mississippi provide for mandatory life without parole sentences for repeat drug offenses (though they do allow them as a discretionary matter). Both states—along with Alabama⁶⁵—mandate life without parole sentences for certain nonviolent *first-time* drug offenders.⁶⁶ In Mississippi, a person convicted of possession with intent to sell two ounces of heroin would receive a mandatory sentence of life without parole, even if that person had no prior criminal history.⁶⁷

The other two states that use nonviolent life without parole sentences with regularity emphasize property crimes over drug offenses. Alabama has 171 prisoners serving life without parole for nonviolent

for a third or subsequent conviction for manufacture, sale, etc. of, e.g., 25 pounds or more of marijuana or 10 grams or more of heroin.

62. *See* State v. Lindsey, 770 So. 2d 339, 347–48 (La. 2000) (Johnson, J., dissenting) (arguing that the defendant’s sentence of life without the possibility of parole for purse-snatching was constitutionally excessive and grossly disproportionate under the Eighth Amendment). For further examples of offenses for which Louisiana mandates life without parole for repeat offenders, see LA. STAT. ANN. §§ 15:529.1(A)(3)(b), 14:65.1, 14:62, 14:66 (2015) (detailing offenses for which Louisiana mandates life without parole for repeat offenders).
63. Caitlyn Lee Hall, Note, *Good Intentions: A National Survey of Life Sentences for Nonviolent Offenses*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 1101, 1212–13 (2013).
64. *See id.* at 1124 (citing OKLA. STAT. ANN. tit. 63 § 2-509(D) (West 2015)) (allowing for discretionary life without parole sentences for converting marijuana to hashish).
65. *See* ALA. CODE § 13A-12-231(1)(d), (2)(d) (2014) (stating that manufacture, sale, etc. of 10 kilograms or more of cocaine or 1,000 pounds or more of cannabis results in mandatory life without parole sentence).
66. FLA. STAT. ANN. § 893.135(1)(b)(2), (1)(b)(3), (1)(c)(2), (1)(c)(3) (West 2015); MISS. CODE ANN. § 41-29-139(f) (2015).
67. MISS. CODE ANN. § 41-29-139(f) (2015).

property offenses compared to 49 for nonviolent drug offenses.⁶⁸ Likewise, Florida has 203 people serving life without parole for nonviolent property offenses and just 45 for nonviolent drug offenses.⁶⁹ Nonviolent property offenses, which can trigger a life without parole sentence under Florida's habitual offender law, include unarmed burglary and simple arson.⁷⁰

The ACLU concludes that "Louisiana, Florida, Alabama, Mississippi, and South Carolina are among the states with the highest numbers of prisoners serving LWOP for nonviolent crimes nationwide, largely because of these states' harsh habitual offender laws that mandate LWOP sentences for repeat offenders."⁷¹

As with the federal crime policies discussed above, these state laws were largely passed in the 1980s and 1990s in response to a public sentiment that indeterminate sentencing and parole schemes were unfair and ineffective.⁷² Harsh mandatory minimums for nonviolent offenders first took root in the 1970s with New York's "Rockefeller Laws."⁷³ Seeking to score political points for an upcoming presidential bid, Nelson Rockefeller, the governor of New York, decided to get "tough on crime" just nineteen months before leaving his post for the White House. In his State of the State address on January 3, 1973, Rockefeller demanded that "every illegal-drug dealer be punished with a mandatory prison sentence of life without parole," shepherding in new drug laws soon after.⁷⁴ Most life without parole sentences for nonviolent offenders in the states, however, are the result of laws that were passed two decades later amid growing concerns about crime nationally.⁷⁵ In part, this was due to the "back-end" modification of abolishing parole in certain states.⁷⁶ During the mid-1990s, public opinion polls consistently reported crime as the most important problem facing the

68. TURNER & BUNTING, *supra* note 4, at 23.

69. *Id.*

70. FLA. STAT. ANN. § 775.084(1)(d), (4)(d) (West 2012).

71. TURNER & BUNTING, *supra* note 4, at 25.

72. See SABOL ET AL., *supra* note 2, at 9 (discussing changes in sentencing reforms).

73. MANDATORY MINIMUM PENALTIES 1991, *supra* note 30, at 95 n.501.

74. Eric Schlosser, *The Prison-Industrial Complex*, THE ATLANTIC (Dec. 1998), <http://www.theatlantic.com/magazine/archive/1998/12/the-prison-industrial-complex/304669/> [<http://perma.cc/9NFH-6CNL>].

75. See Hall, *supra* note 63, at 1159 (listing jurisdictions that have statutes with possible life without parole sentences and classifying those statutes based on whether LWOP is mandatory).

76. For example, in 1994, Florida's legislature enacted a bill that meant persons receiving a life sentence for crimes committed on or after October 1, 1995 would no longer be eligible for parole. U.S. DEP'T OF JUSTICE, NATIONAL

nation.⁷⁷ A 2011 study by the Urban Institute notes the rapid expansion of truth-in-sentencing laws during this period.⁷⁸ Forty-two states had implemented some form of truth-in-sentencing laws by 1999,⁷⁹ and many had adopted sentencing policies that included a mix of mandatory minimum penalties, habitual offender laws, and increased sentencing severity for nonviolent offenses.⁸⁰ As discussed above, each of these policies contributed to an uptick in life sentences for people convicted of nonviolent crimes.⁸¹

Though support for mandatory minimum penalties flourished in the states at the same time as the federal government was enacting stiff penalties for drug and other nonviolent offenses, nonviolent life without parole sentences have remained geographically concentrated in just a handful of jurisdictions.⁸² Today, according to the ACLU, only the federal government, Alabama, Florida, Georgia, Illinois, Louisiana, Mississippi, Oklahoma, and South Carolina have prisoners serving nonviolent LWOP.⁸³ Missouri was included in the ACLU's report because one person was serving life without parole for a nonviolent crime there; however, that sentence was recently commuted by the governor.⁸⁴

INSTITUTE OF CORRECTIONS, STATE LEGISLATIVE ACTIONS ON TRUTH IN SENTENCING: A REVIEW OF LAW AND LEGISLATION IN THE CONTEXT OF THE VIOLENT CRIME CONTROL LAW ENFORCEMENT ACT OF 1994 53.

77. Sarah Sun Beale, *Still Tough On Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 417 (2003).
78. SABOL ET AL., *supra* note 2, at 9.
79. *Id.* at 7.
80. *Id.* at 9.
81. See TURNER & BUNTING, *supra* note 4, at 20–21 (“A sentence to life without parole, . . . means the prisoner has no prospect for release . . . regardless of . . . efforts of rehabilitation: virtually every person sentenced to LWOP dies in prison.”).
82. See, e.g., MANDATORY MINIMUM PENALTIES 1991, *supra* note 30, at 9 (“While the trend toward mandatory minimums in the states was gradual, by 1983, 49 of the 50 states had passed such provisions.”).
83. See TURNER & BUNTING, *supra* note 4, at 22. The Departments of Corrections of Delaware, Virginia, and Nevada did not provide data requested by the ACLU so the number of people serving nonviolent life without parole in these three states, if any, is unknown. *Id.*
84. Steven Nelson, *Man Doomed to Prison Death for Pot Being Released*, U.S. NEWS (Aug. 11, 2015), <http://www.usnews.com/news/articles/2015/08/11/man-doomed-to-prison-death-for-pot-being-released> [<http://perma.cc/V7Y8-B4WA>].



Chart 1. Use of Nonviolent Life Without Parole in the United States⁸⁵

*D. The Current Swing Against Nonviolent Life
 Without Parole Sentences*

As discussed above, the widespread implementation of mandatory minimums and habitual offender laws has led to a well-documented crisis in federal and state prisons with unprecedented overcrowding and rapidly aging prison populations.⁸⁶ Former overseers of these policies, including former president Bill Clinton, members of Congress from both sides of the aisle, and the current President, are now turning against such policies and calling for redress. Both promises of executive clemency and proposed federal legislation have the potential to significantly reduce the size of the federal nonviolent life without parole population but only if significant hurdles can be overcome.

1. Changing Attitudes

Many of the key architects of the 1980s and 1990s tough-on-crime laws have since come to reject them as “overly broad” and “overdone”—

85. JENNIFER TURNER & WILL BUNTING, AM. CIV. LIBERTIES UNION, A LIVING DEATH: LIFE WITHOUT PAROLE FOR NONVIOLENT OFFENSES 23 (Vanita Gupta et al. eds., 2013). This figure does not reflect the growing number of commutations by President Obama of federal prisoners serving nonviolent life without parole, which totaled sixty-nine at the time of writing.

86. See, e.g., Kevin Johnson & H. Darr Beiser, *Aging Prisoners' Costs Put Systems Nationwide in a Bind*, USA TODAY (July 11, 2013), <http://www.usatoday.com/story/news/nation/2013/07/10/cost-care-aging-prisoners/2479285/> [<http://perma.cc/5GVS-XT8C>] (explaining unexpected governmental cost increases for aging prisoners).

particularly with respect to nonviolent offenders.⁸⁷ As early as 2000, when he was nearing the end of his presidency, Bill Clinton acknowledged that the laws of the previous two decades had swept up far too many people convicted of nonviolent crimes. He told *Rolling Stone* magazine that “[w]e really need a reexamination of our entire policy on imprisonment. . . . There are tons of people in prison who are nonviolent offenders—who have drug-related charges that are directly related to their own drug problems.”⁸⁸ In that same interview, Clinton said that possession of small amounts of marijuana should be decriminalized, that nonviolent offenders are serving sentences that are too long in many cases, and that mandatory minimums need to be reexamined. Clinton told the magazine, “I don’t believe, by and large, in permanent lifetime penalties.”⁸⁹ Around the same time, public support for alternative sentences for nonviolent offenders, particularly drug offenders, was shown to have increased, and support for mandatory sentences had decreased since the 1990s.⁹⁰

During a 2007 Democratic Primary Debate, presidential hopeful Hillary Clinton, who in 1994 had touted the virtues of three strikes laws,⁹¹ similarly singled out nonviolent offenders as being held captive by a prison system that was supposed to target violent criminals: “We need diversion, like drug courts. Nonviolent offenders should not be serving hard time in our prisons. They need to be diverted from our prison system.”⁹² In the same speech, she noted that mandatory minimums have been too widely used, beyond the certain violent crimes for

87. Ed Pilkington, *Bill Clinton: Mass Incarceration on My Watch ‘Put Too Many People in Prison,’* THE GUARDIAN (April 28, 2015), <http://www.theguardian.com/us-news/2015/apr/28/bill-clinton-calls-for-end-mass-incarceration> [http://perma.cc/68RG-TWDV].

88. Jann S. Wenner, *Bill Clinton: The Rolling Stone Interview*, ROLLING STONE MAGAZINE (Dec. 28, 2000), <http://www.rollingstone.com/politics/news/the-rolling-stone-interview-bill-clinton-20001228#ixzz3iiD7Cnfq> [http://perma.cc/Z2QM-WFVB].

89. *Id.*

90. Beale, *supra* note 77, at 423.

91. In a 1994 speech at the Annual Women in Policing Conference, First Lady Hilary Clinton espoused the virtues of her husband’s crime bill which would deliver stiff penalties to repeat offenders: “[W]e need more and tougher prison sentences for repeat offenders. The three strikes and you’re out for violent offenders has to be part of the plan. We need more prisons to keep violent offenders for as long as it takes to keep them off the streets.” *Hilary Clinton on Crime*, ON THE ISSUES, http://www.issues2000.org/Domestic/Hillary_Clinton_Crime.htm [http://perma.cc/R57N-2FLR] (last visited Oct. 15, 2015).

92. *Id.*

which they were needed.⁹³ Indeed, more than ninety percent of individuals interviewed in the ACLU's 2013 study regarding people sentenced to die in prison for nonviolent offenses were given mandatory life without parole sentences.

Former President Clinton now says that part of the problem is that crime laws of his era were "overly broad instead of appropriately tailored," catching too many people in the net and keeping them entangled for too long.⁹⁴ Clinton would later liken the federal government's passage of his 1994 bill as taking a "shotgun to a problem that needed a .22."⁹⁵ Addressing a group of seventy mayors and law enforcement officials in 2014, Clinton said, "We . . . just sent everybody to jail for too long."⁹⁶ Again, not only did he recognize this to be true of the federal system but also of state laws influenced by the trend at the time: "In that [1994] bill, there were longer sentences, and most of these people are in prison under state law, but the federal law set a trend. And that was overdone; we were wrong about that."⁹⁷

An extraordinary range of political voices have called for significant reform of harsh mandatory minimums, including presidential hopefuls Ted Cruz, Chris Christie, and Hillary Clinton, as well as former Speaker of the House, John Boehner.⁹⁸ There is a broad recognition among lawmakers that the punitive drug sentences aimed at deterring serious drug traffickers have instead led to the incarceration of mostly low-level drug addicts.⁹⁹ This is in part because judges and corrections officials have

93. *Id.*

94. Pilkington, *supra* note 87.

95. Kasie Hunt, *Bill Clinton: Prison Sentences to Take Center Stage in 2016*, MSNBC (Oct. 10, 2014), <http://www.msnbc.com/msnbc/bill-clinton-prison-sentences-take-center-stage-2016> [<http://perma.cc/C73J-TR6J>].

96. *Id.*

97. Jacob Sullum, *Boehner Endorses Sentencing Reform; Bill Clinton Apologizes for His Role in Mass Incarceration*, HIT & RUN BLOG (July 17, 2015, 10:32 AM), <http://reason.com/blog/2015/07/17/boehner-endorses-sentencing-reform-bill> [<http://perma.cc/455H-TDDM>].

98. In a recent book of essays published by The Brennan Center, a number of presidential candidates suggested policy solutions to the problem of mass incarceration. *See generally* JOSEPH R. BIDEN, JR. ET AL., SOLUTIONS: AMERICAN LEADERS SPEAK OUT ON CRIMINAL JUSTICE (Inimai Chettiar & Michael Waldman eds., 2nd ed. 2015). Then-House Speaker John Boehner (R-Ohio) recently said during a weekly news briefing that "[w]e've got a lot of people in prison, frankly, who really, in my view, really don't need to be there. It's expensive to house prisoners. Sometimes, frankly, some of these people are there for what I'll call flimsy reasons." Sullum, *supra* note 97.

99. A 2013 report by the US Sentencing Commission demonstrates that many people convicted under federal drug legislation were first-time offenders and

long been telling them so.¹⁰⁰ In a 2012 editorial in *The Nation*, federal district judge Mark W. Bennett wrote that after nineteen years on the bench, he had sent more than a thousand people to federal prison for mandatory minimum sentences that included life without the possibility of release and yet could count on one hand the number of those people that were high-level drug traffickers.¹⁰¹ In a 2003 address to the American Bar Association, Supreme Court Justice Anthony Kennedy echoed these concerns, saying “I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust.”¹⁰² The qualms of these and other judges are supported by the findings of the U.S. Sentencing Commission, which has consistently found that the federal laws are mostly applied to lower-level and first-time offenders.¹⁰³ A 2013 report by the Congressional Research Service found that only twenty percent of federal prisoners convicted of drug offenses were charged with high-level trafficking offenses.¹⁰⁴

Against the backdrop of this swelling call for reform, President Barack Obama announced that he would be granting clemency to certain nonviolent offenders who were serving unjust sentences.

2. Executive Action

With his second term nearing an end, President Obama announced a plan to grant clemency to nonviolent offenders on a significant scale. The President’s use of his clemency power—which so far has resulted

served sentences for relatively minor offenses. UNITED STATES SENTENCING COMM’N, QUICK FACTS: DRUG TRAFFICKING OFFENSES (2013).

100. See, e.g., TURNER & BUNTING, *supra* note 4, at 7 (according to Burl Cain, the warden of Louisiana State Penitentiary, “[t]here’s an answer to this without being so extreme. But we’re still living-20-years-ago extreme. Throw the human away. He’s worthless. Boom: up the river. And yet, he didn’t even kill anybody. He didn’t do anything, but he just had an addiction he couldn’t control and he was trying to support it robbing. That’s terrible to rob people—I’ve been robbed, I hate it. I want something done to him. But not all his life. That’s extreme. That’s cruel and unusual punishment to me.”).
101. Judge Mark W. Bennett, *How Mandatory Minimums Forced Me to Send More Than 1,000 Nonviolent Drug Offenders to Federal Prison*, THE NATION (Oct. 24, 2012), <http://www.thenation.com/article/how-mandatory-minimums-forced-me-send-more-1000-nonviolent-drug-offenders-federal-pri/> [<http://perma.cc/R5RG-382M>].
102. AM. BAR ASSOC., JUSTICE KENNEDY COMMISSION: REPORTS WITH RECOMMENDATIONS TO THE ABA HOUSE OF DELEGATES 4 (2004).
103. MANDATORY MINIMUM PENALTIES 2011, *supra* note 32, at 168–69.
104. LISA SACCO & KRISTIN FINKLEA, CONG. RESEARCH SERV., R43164, STATE MARIJUANA LEGALIZATION INITIATIVES: IMPLICATIONS FOR FEDERAL LAW ENFORCEMENT 13 (2014).

in eighty-nine sentence reductions and is expected to result in hundreds more¹⁰⁵—is the most forceful rejection of extreme sentences for nonviolent offenders delivered by a president since the era of mass incarceration began in the 1970s.¹⁰⁶ Announcing the commutations of forty-six sentences in a single day in July, 2015, President Obama noted how outdated the sentences for nonviolent offenses were: “Their punishments didn’t fit the crime, and if they had been sentenced under today’s laws, nearly all of them would have already served their time.”¹⁰⁷ Speaking specifically to prisoners whose sentences denied them an opportunity to demonstrate that they had changed over time, such as people serving nonviolent life without parole, the President added, “I believe that at its heart America is a nation of second chances. And I believe these folks deserve their second chance.”¹⁰⁸ To date, President Obama has commuted sixty-nine life sentences for nonviolent offenders¹⁰⁹

The White House has also called on Congress to implement much-needed reforms to address what it considers an outsized problem. After the last round of commutations, tens of thousands of federal prisoners had petitioned for clemency via the process¹¹⁰ initiated by Deputy

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105. Sari Horwitz & Juliet Eilperin, *Obama Commutes Sentences of 46 Nonviolent Drug Offenders*, THE WASHINGTON POST (July 13, 2015), https://www.washingtonpost.com/world/national-security/obama-commutes-sentences-of-46-non-violent-drug-offenders/2015/07/13/b533f61e-2974-11e5-a250-42bd812efc09_story.html [http://perma.cc/7MY3-T5LC].
106. Peter Baker, *Obama Plans Broader Use of Clemency to Free Nonviolent Drug Offenders*, N.Y. TIMES (July 3, 2015), http://www.nytimes.com/2015/07/04/us/obama-plans-broader-use-of-clemency-to-free-nonviolent-drug-offenders.html?_r=0 [http://perma.cc/957T-CVEL] (“But even as he exercises authority more assertively than any of his modern predecessors, Mr. Obama has only begun to tackle the problem he has identified.”).
107. Neil Eggleston, *President Obama Announces 46 Commutations in Video Address: “America Is a Nation of Second Chances,”* THE WHITE HOUSE (July 13, 2015), <https://www.whitehouse.gov/blog/2015/07/13/president-obama-announces-46-commutations-video-address-america-nation-second-chance> [https://perma.cc/W8S5-9UHS].
108. *Id.*
109. *Commutations Granted by President Barack Obama (2009–2015)*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/pardon/obama-commutations> [https://perma.cc/5DZ8-X58M].
110. According to the Clemency Project 2014 website, Deputy Attorney General James Cole asked the legal profession to provide *pro bono* assistance to federal prisoners who would likely have received a shorter sentence if they had been sentenced today. Clemency Project 2014 members collaborate to recruit and train attorneys on how to screen for prisoners who meet the stated criteria and assist prisoners who meet the criteria to find lawyers to represent them to file their clemency petitions. CLEMENCY PROJECT 2014, <https://www.clemencyproject2014.org/> [https://perma.cc/ZF7Q-VQUP].

Attorney General James Cole. White House press secretary Josh Earnest said that this demonstrates “how important it is for Congress to take action, that congressional action in this case could be much broader in terms of delivering the kind of justice and implementing the kind of reforms the president believes is long overdue.”¹¹¹

3. Federal Legislation

Congress has responded to the White House’s call to redress the sweeping and inflexible nature of crime legislation that it passed under Reagan and Clinton, particularly in respect of nonviolent offenders. Two significant reform bills introduced into Congress would bring widespread change.¹¹²

The first was introduced by a bipartisan group of lawmakers in February 2015 and would eliminate life with parole sentences for drug offenders altogether.¹¹³ The Smarter Sentencing Act would prospectively reduce life without parole sentences to twenty-five years (Senate version) or twenty years (House version). In addition, the bill would make the Fair Sentencing Act retroactively applicable, reduce mandatory minimums for nonviolent drug offenders, and extend the ability of federal judges to depart from mandatory minimums in certain cases. Senators Richard Durbin (D-IL) (the second-ranking Democrat) and Mike Lee (R-UT) are sponsoring the bill in the Senate and Representatives Raul Labrador (R-ID) and Bobby Scott (D-VA) are doing likewise in the House of Representatives. The legislation has an impressive list of cosponsors: four Republicans that include Rand Paul (R-Ky.) and Ted Cruz (R-Texas), both presidential candidates for the 2016 GOP nomination and an additional six Democrats. However, it may

111. Horwitz & Eilperin, *supra* note 105.

112. In addition, in 2010, Congress finally reduced the crack cocaine sentencing disparity that had resulted in African Americans serving, on average, nearly as much time in prison for nonviolent drug offenses as whites spent in prison for violent offenses. Though the legislation received near unanimous support, the Fair Sentencing Act (2010) took more than a decade to pass through Congress, and even then, it was not retroactive. *Fair Sentencing Act*, ACLU, <https://www.aclu.org/node/17576> [<http://perma.cc/J7VL-Y58V>] (last visited Oct. 8, 2015). The bill did, however, reduce the sentencing gap between offenses for crack and powder cocaine dramatically, from 100:1 to 18:1. A year later, the U.S. Sentencing Commission voted to retroactively apply the Fair Sentencing Act Guidelines to individuals sentenced before the law was enacted, allowing individual prisoners to petition for a sentence review and possible reduction in federal courts. The application of the amendment was limited to offenders whose sentences were not controlled by mandatory minimums or the three-strikes law, which includes nonviolent offenders serving life sentences. *Id.*

113. Lydia Wheeler, *Bipartisan Bill Would Ease Drug Sentences*, THE HILL (Feb. 12, 2015), <http://thehill.com/regulation/232670-bill-targets-prison-population-through-non-violent-drug-crimes> [<http://perma.cc/CWG8-2RW5>].

not get very far if the chairman of the Senate Judiciary Committee, Senator Chuck Grassley (R-Iowa), continues to stand in its way. Given Grassley's adamant support for the current federal mandatory minimums prescribed for drug crimes, the bill's success does not seem likely. Notably, Grassley is now working on his own criminal justice reform proposal in part because even his constituents have begun to demand action.¹¹⁴

The sandbagging of the Smarter Sentencing Act has not stymied a push for imminent criminal justice reform legislation in Congress in part because the President's clemency announcements keep pushing the momentum forward. Recognizing that Obama's commutation project is not a substitute for legislation,¹¹⁵ Rep. Robert C. "Bobby" Scott (D-Va.) and Rep. F. James Sensenbrenner Jr. (R-Wis.) introduced the SAFE Justice Act—a piece of legislation that would go even further than the Smarter Sentencing Act by strengthening probation programs, offering more protections for poor defendants, and making it easier for elderly inmates to secure early release.¹¹⁶ The bill would also reduce the mandatory minimum life sentences for a third felony drug offense or a second drug offense that results in death or serious bodily injury to a mandatory minimum term of thirty-five years.¹¹⁷ Unlike the change to life sentences in the Smarter Sentencing Act, this provision in the bill would be retroactive if it becomes law.

The SAFE Justice Act has widespread support in Congress, with nearly forty cosponsors in the House. The current Speaker of the House, Paul Ryan, has also been a proponent of reducing mandatory minimums.¹¹⁸

114. Isaac Stanley-Becker, *Senator Holds Key to Sentencing Changes*, WALL ST. J. (Aug. 5, 2015), <http://www.wsj.com/articles/senator-holds-key-to-sentencing-changes-1438767000> [<http://perma.cc/XK53-LRWP>] ("Home on a recent weekend, Mr. Grassley faced questions about criminal justice at two town meetings—a surprise, he said, as it marked the first time this year constituents had raised the topic.").

115. Horwitz & Eilperin, *supra* note 105.

116. Russell Berman, *The Moment for Criminal-Justice Reform?*, THE ATLANTIC (July 10, 2015), www.theatlantic.com/politics/archive/2015/07/congress-obama-criminal-justice-reform/398045/ [<http://perma.cc/T8SZ-XRN2>].

117. Sensenbrenner-Scott SAFE Justice Reinvestment Act, H.R. 2944, 114th Cong. § 412(e) (2015).

118. David Gagan, *Paul Ryan Could Take the Easy Road on Criminal Justice Reform. He Shouldn't*, HUFFINGTON POST (Jan. 12, 2016) http://www.huffingtonpost.com/david-dagan/paul-ryan-easy-road-criminal-justice_b_8962592.html [<https://perma.cc/Z7UW-5FU8>] ("The Speaker himself has previously co-sponsored a sweeping proposal to cut drug-related mandatory

As with the Smarter Sentencing Act, however, there is a well-founded fear that individuals set against the legislation will kill it.¹¹⁹ The length of time it took for Congress to reform the crack versus powder cocaine sentencing disparity even after there was widespread support to do so cautions against optimism.¹²⁰

4. State Legislation

Since 1998 there has been a slow but steady rollback of mandatory minimum laws, particularly for nonviolent offenders. Families Against Mandatory Minimums provides a comprehensive list of states that have reformed mandatory minimum penalties, some of which allowed reduced sentences for thousands of people at a time.¹²¹ Michigan began the trend in 1998 when it repealed mandatory life without parole sentences for certain drug offenses and applied the law retroactively.¹²² It followed up with further repeals of mandatory minimums for drug offenses in 2003 and 2010.¹²³ In 2012, California voters overwhelmingly supported a proposition to amend the state's "three strikes" mandatory minimum law so that its application was restricted to serious or violent felonies.¹²⁴ The law had previously mandated a life sentence for any third offense, even if it was minor and nonviolent.¹²⁵ Georgia lawmakers passed a bill that extends parole eligibility to certain nonviolent drug offenders who are sentenced to a term of at least twelve years up to a life sentence who were not previously eligible for parole consideration.¹²⁶ Even Louisiana, which continues to imprison the largest portion of people serving nonviolent life sentences among the states, passed a law in 2012 to provide prosecutors with the ability to waive mandatory minimums in the case of nonviolent offenses.¹²⁷

minimum sentences in half, and he included criminal-justice reforms in his 2014 anti-poverty plan.”).

119. See Berman, *supra* note 116 (noting that congressional Republicans have been “resistant to the issue in the past”).

120. MANDATORY MINIMUM PENALTIES 2011, *supra* note 32, at 29–30.

121. FAMILIES AGAINST MANDATORY MINIMUMS, RECENT STATE-LEVEL REFORMS TO MANDATORY MINIMUM LAWS 1 (2013).

122. *Id.* at 3.

123. *Id.*

124. *Id.* at 1.

125. *Id.*

126. H.B. 328, 153rd Gen. Assemb., Reg. Sess. (Ga. 2015).

127. See FAMILIES AGAINST MANDATORY MINIMUMS, *supra* note 121, at 2 (describing Louisiana prison reforms).

More broadly, many states are looking for ways to transform their expensive and punitive sentencing schemes so that they encourage diversion and rehabilitation. For example, twenty-seven have signed up for the U.S. Department of Justice's "Justice Reinvestment Initiative" to date.¹²⁸ South Carolina, one of the program's "success stories," has reduced the portion of its prison population that were low-level, non-violent offenders to thirty-seven percent where it had previously made up more than half.¹²⁹ Current and former state governors are now regularly touting the importance of directing nonviolent offenders out of the system.¹³⁰

The broader sentencing schemes which gave rise to the regular use of nonviolent life without parole have steadily fallen out of favor. As a growing number of jurisdictions turn away from habitual offender laws and mandatory minimum penalties, life without parole sentences for nonviolent offenders are increasingly concentrated in just a handful of states and the federal system. In a new era of "smart" rather than "tough" justice, these sentences appear increasingly extreme and out-dated.

II. CHOOSING THE APPROPRIATE EIGHTH AMENDMENT DOCTRINE: THE GROSS DISPROPORTIONALITY APPROACH OR THE CATEGORICAL APPROACH?

What legal recourse do offenders serving life without parole sentences have available to challenge the harshness of their punishment? In terms of available constitutional claims, it is the Eighth Amendment that protects individuals against cruel and unusual punishments inflicted by the government. Before looking at how offenders can lodge the optimal constitutional challenge to the practice of sentencing individuals convicted of nonviolent offenses to life without parole, this Article identifies the two different doctrinal approaches that the Supreme Court has used to evaluate claims that a defendant's punishment

128. *Justice Reinvestment Initiative*, BUREAU OF JUSTICE ASSISTANCE, <https://www.bja.gov/programs/justicereinvestment/index.html> [http://perma.cc/6YS6-ZY6W] (last visited Feb. 19, 2016).

129. *Success Stories*, BUREAU OF JUSTICE ASSISTANCE, https://www.bja.gov/programs/justicereinvestment/success_stories.html [http://perma.cc/697D-RF97] (last visited Oct. 13, 2015).

130. *E.g.*, MIKE HUCKABEE, *Treat Drug Addiction and Address Character*, in SOLUTIONS: AMERICAN LEADERS SPEAK OUT ON CRIMINAL JUSTICE 43–47 (Inimai Chettiar & Michael Waldman eds., 2015) (writing as the former Governor of Arkansas); *see also* CHRIS CHRISTIE, *Save Jail for the Dangerous*, in SOLUTIONS: AMERICAN LEADERS SPEAK OUT ON CRIMINAL JUSTICE 19–23 (Inimai Chettiar & Michael Waldman eds., 2015) (writing as the Governor of New Jersey).

is unconstitutional under the Eighth Amendment. It then explains how and why one approach better accounts for the emerging developments that indicate that the practice may be falling out of favor.

One doctrinal approach, the “gross disproportionality” approach, traditionally describes Court’s analysis of Eighth Amendment sentencing challenges in noncapital cases.¹³¹ The other approach, the “categorical” approach, typically describes Eighth Amendment challenges to a particular punishment based on the offense or a characteristic of the offender;¹³² the Court has utilized this approach almost exclusively in capital cases.¹³³

According to the Court, “[t]he Eighth Amendment, which forbids cruel and unusual punishments, contains a ‘narrow proportionality principle’ that ‘applies to noncapital sentences.’”¹³⁴ To enforce this narrow principle, the Court has utilized a three-part test—the gross disproportionality approach—to determine whether a particular defendant’s noncapital sentence is unconstitutional:

The first part of the test consists of a threshold that typically bars application of the second and third parts. The threshold requires a comparison of offense gravity and sentence severity, and a determination of whether this comparison reveals “gross disproportionality.” The second and third parts call for an intra-jurisdictional review of sentences received within the state for more and less serious crimes, and an interjurisdictional review of sentences received in other states for the same crime. If the

131. See, e.g., Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3185 (2015) (indicating the Supreme Court rarely reviews prison sentences in noncapital cases, but when it does so, it employs a “gross disproportionality” standard).

132. See, e.g., Linda E. Carter, *The Evolution of Justice Kennedy’s Eighth Amendment Jurisprudence on Categorical Bars in Capital Cases*, 44 MCGEORGE L. REV. 229 (2013) (explaining categorical bars to the death penalty).

133. See, e.g., Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1155 (2009) (noting cases where the Supreme Court has used the categorical approach to refuse to impose the death penalty). But see *infra* notes 164–179 and accompanying text (describing the Supreme Court’s recent extension of the categorical approach in the context of life without parole sentences for juvenile offenders).

134. *Ewing v. California*, 538 U.S. 11, 20 (2003) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 996–97 (1991) (Kennedy, J., concurring in part and concurring in judgment)).

threshold is not met, then proportionality analysis ends. Only if the threshold is met do courts apply parts two and three.¹³⁵

If a court determines a sentence is grossly disproportionate and confirms its threshold finding through intrajurisdictional and inter-jurisdictional comparisons, it will strike down that particular defendant's sentence.¹³⁶

Alternatively, the Supreme Court employs the categorical approach "when evaluating a statutory punishment's constitutionality as applied either to a particular criminal offense or a particular class of offenders."¹³⁷ Long ago, the Court held that "[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."¹³⁸ To decide whether those evolving standards mark a punishment as unconstitutional,

[t]he Court first considers "objective indicia of society's standards, as expressed in legislative enactments and state practice" to determine whether there is a national consensus against the sentencing practice at issue. Next, guided by "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose," the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution.¹³⁹

Under this approach, when the Court determines a punishment is unconstitutional, it creates a categorical prohibition that exempts individuals convicted of certain crimes or belonging to a particular class of offenders from the challenged punishment.¹⁴⁰

The gross disproportionality approach provides next to no space for individuals sentenced to life without the possibility of parole to challenge their punishment on Eighth Amendment grounds. The categorical approach is superior to the gross disproportionality approach for several

135. Donna H. Lee, *Resuscitating Proportionality in Noncapital Criminal Sentencing*, 40 ARIZ. ST. L.J. 527, 529 (2008) (citations omitted).

136. See Harmelin, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in judgment) (describing the outcomes in *Solem v. Helm*, 463 U.S. 277 (1983) and *Weems v. United States*, 217 U.S. 349 (1910)).

137. Bidish J. Sarma, *How Hall v. Florida Transforms the Supreme Court's Eighth Amendment Evolving Standards of Decency Analysis*, 62 UCLA L. REV. DISCOURSE 186, 192 (2014).

138. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

139. Ian P. Farrell, *Strict Scrutiny Under the Eighth Amendment*, 40 FLA. ST. U. L. REV. 853, 859 (2013) (citations omitted).

140. See Sarma, *supra* note 137, at 192 (exempting individuals convicted of certain crimes from execution).

reasons: the gross disproportionality approach is doctrinally incoherent; the Supreme Court has almost entirely sapped whatever potency the gross disproportionality approach may have once retained in theory (if it ever had any); the categorical approach provides a meaningful framework within which individuals sentenced to die in prison for minor or nonviolent offenses can situate their claims for constitutional relief; and the categorical approach provides for uniformity—a value that evades the gross disproportionality approach altogether. And although its earlier jurisprudence once suggested that all noncapital Eighth Amendment challenges would be subjected to review under the gross disproportionality test, the Supreme Court has recently clarified and deepened its commitment to the categorical approach even in the noncapital context. For these reasons—explored more in-depth in this Part—this Article ultimately evaluates the Eighth Amendment question posed by life without parole sentences imposed on nonviolent offenders by using the Supreme Court’s categorical approach and the accompanying analytical framework.¹⁴¹

Among its prominent drawbacks, the gross disproportionality approach rests upon unstable jurisprudential foundations.¹⁴² The test that until recently ostensibly governed claims that punishments in noncapital cases were cruel and unusual first appeared in Justice Kennedy’s concurring opinion in *Harmelin* in 1991.¹⁴³ Confusion reigned even before *Harmelin* and well before the Court’s own eventual, albeit tentative,¹⁴⁴ embrace of Justice Kennedy’s concurring opinion.¹⁴⁵ When

141. For a critique of the idea that these two approaches can be meaningfully distinguished, see O’Hear, *supra* note 27, at 1111.

142. See Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court’s Tortured Approach to Cruel and Unusual Punishment*, 84 KY. L.J. 107, 107 (1996) (“The result of [a] series of flawed opinions from the Supreme Court is that the state of the law with respect to proportionality in sentencing is confused, and what law can be discerned rests on weak foundations.”).

143. See Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 693 (2005) (“There was no majority opinion [in *Harmelin*], but the opinion that eventually came to assume the status of law was Justice Kennedy’s concurring opinion”); see also *id.* at 693 n.79 (citing cases); see also Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 149 n.199 (2007) (noting that courts have continued to apply Justice Kennedy’s test from *Harmelin*).

144. In 2003, a plurality of the Court indicated that “[t]he proportionality principles . . . distilled in Justice Kennedy’s concurrence guide our application of the Eighth Amendment.” *Ewing v. California*, 538 U.S. 11, at 23–24 (2003) (plurality opinion).

145. See, e.g., Scott K. Petersen, Note, *The Punishment Need Not Fit the Crime: Harmelin v. Michigan and the Eighth Amendment*, 20 PEPP. L. REV. 747,

he set forth the test, Justice Kennedy pointed out that “[t]hough our decisions recognize a proportionality principle, its precise contours are unclear.”¹⁴⁶ The Court’s inconsistent articulation of the proportionality principle’s scope and its repeated failure to use a consistent test for determining whether a sentence was disproportionate prompted it to admit that its “precedents in this area have not been a model of clarity. . . . Indeed, in determining whether a particular sentence for a term of years can violate the Eighth Amendment, we have not established a clear or consistent path for courts to follow.”¹⁴⁷ Not once has a majority of justices in a self-contained opinion adopted the gross disproportionality test. Given the history of an approach that has, at best, developed in fits and starts,¹⁴⁸ it may be that the next time the justices return to the approach, they will inaugurate another doctrinal shift, return to an old and substantively different formulation of the test, or perhaps abandon the underlying proportionality principle altogether.¹⁴⁹

761 (1993) (“In the 1980 decision of *Rummel v. Estelle*, the Supreme Court retreated from its past decisions that incorporated a proportionality guarantee in the Eighth Amendment.”).

146. *Harmelin v. Michigan*, 501 U.S. 957, at 998 (1991) (Kennedy, J., concurring in part and concurring in judgment).

147. *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003); see also Sara Taylor, Commentary, *Unlocking the Gates of Desolation Row*, 59 UCLA L. REV. 1810, 1815 (2012) (“Moreover, to the extent that the Court has used the Punishments Clause to review noncapital sentences, it has not provided a clear doctrine for lower courts, plaintiffs, and attorneys to follow in dealing with challenges to noncapital sentences.”).

148. See *Lee*, *supra* note 143, at 692–93 (“The key cases . . . sit uneasily with each other, and there is still much uncertainty about how the case law will eventually settle, especially given the rarity of majority opinions in this area.”).

149. See, e.g., Taylor, *supra* note 147, at 1819 (2012) (“One source of uncertainty is a consistent thread of pluralities, concurrences, and dissents that have pushed back against the presence of any proportionality requirement in the noncapital context, suggesting that the principle could lose the support of a majority of the Court in the future.”); see also *id.* at 1815 (“In each of the rare cases in which the Court has confronted an Eighth Amendment challenge to a noncapital sentence, it has applied a different rubric for analyzing the gravity of the offense. While some of the modes of analysis vary only slightly, in other cases the approach is completely different from anything the Court has done in the past. As a result, it is not clear how a court will review a given noncapital sentence to determine if it is grossly disproportionate, making it exceedingly difficult for prisoners to bring successful claims.”).

Not only is the gross disproportionality test unstable,¹⁵⁰ but it has also proven to be toothless. The case law is “sparse,”¹⁵¹ but the outcomes in a pair of 2003 Supreme Court cases, *Ewing v. California*¹⁵² and *Lockyer v. Andrade*,¹⁵³ make clear that efforts to challenge long prison terms under the gross disproportionality approach are likely to fail.¹⁵⁴ In *Ewing*, the Supreme Court upheld a defendant’s sentence of twenty-five years to life under California’s three-strikes regime in which “[t]he sentence-triggering criminal conduct consist[ed] of the theft of three golf clubs priced at a total of \$1,197.”¹⁵⁵ And in *Andrade*, the Court reversed a lower court’s grant of habeas relief to a defendant whom was sentenced to two consecutive twenty-five-to-life prison terms under California’s three-strikes law for the theft of nine videotapes valued at approximately \$150.¹⁵⁶ These cases culminate in what one commentator has called the “enfeeblement of the Eighth Amendment’s proportionality requirement.”¹⁵⁷

Many legal scholars, litigants, and commentators have critiqued the gross disproportionality approach because it essentially commands courts to defer to legislatures and prosecutors, removing extremely harsh sentences from the Constitution’s reach. The words of Professors Steiker and Steiker appropriately summarize these critiques: “The application of this . . . threshold requirement of gross disproportionality has proven to be an insurmountable hurdle for Eighth Amendment challenges to long prison terms.”¹⁵⁸ In other words, unless one subscribes

150. See also *Graham v. Florida*, 560 U.S. 48, 86 (2010) (Roberts, C.J., concurring) (“Our Court has struggled with whether and how to apply the Cruel and Unusual Punishments Clause to sentences for noncapital crimes.”).

151. Jackson, *supra* note 131, at 3185 (“The Court has repeatedly considered the proportionality of death sentences and held them to be unconstitutional . . . but its non-capital case law has been parsimonious in reviewing prison sentences under the ‘gross disproportionality’ standard. Indeed, the Court’s Eighth Amendment case law on non-capital sentences for adult offenders is sparse.”).

152. 538 U.S. 11 (2003) (plurality opinion).

153. 538 U.S. 63 (2003).

154. See, e.g., Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1059 (2004) (“In 2003, in *Ewing* and *Andrade*, the Court greatly weakened, if not almost eliminated, proportionality review, as applied to prison sentences.”).

155. *Ewing v. California*, 538 U.S. 11, 35 (2003) (Breyer, J., dissenting).

156. See *Lockyer v. Andrade*, 538 U.S. 63, 66 (2003) (describing the appellate court’s disposition).

157. Nilsen, *supra* note 143, at 151.

158. Carol S. Steiker & Jordan M. Steiker, *Opening A Window or Building A Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy*

to the premise that the Constitution does not entail a proportionality principle—a stance that one current Supreme Court justice defends¹⁵⁹—the current situation is bleak. The Constitution itself promises that the government will not inflict cruel and unusual punishments on individuals, but the Court has essentially decided that no noncapital sentence will ever be deemed unconstitutional. Rather than acknowledge that it has failed to devise an enforceable remedy to protect the individual's Eighth Amendment right,¹⁶⁰ the Court has instead determined that the right means so little that it may as well not exist.¹⁶¹

While it may seem that the jurisprudence forecloses a meaningful Eighth Amendment challenge to life without parole sentences for individuals convicted of nonviolent offenses, the Court's other approach, the categorical approach, provides an alternative well worth exploring. Before 2010, the Court only utilized this approach in death

on Criminal Justice More Broadly, 11 U. PA. J. CONST. L. 155, 186 (2008); *see also* Taylor, *supra* note 147, at 1835 (“The doctrine is so narrow and forbids only such extreme sentences that it allows relief in a vanishingly small number of cases and allows almost any sentence to pass constitutional muster. The combination of an extremely high doctrinal standard and an extremely deferential treatment of state decisions allows the Court to conclude that sentences that are extremely harsh in comparison to the crime committed—sentences that should be viewed as grossly disproportionate—do not violate the proportionality principle.”).

159. *See Ewing*, 538 U.S. at 32 (Thomas, J., concurring in judgment) (“In my view, the Cruel and Unusual Punishments Clause of the Eighth Amendment contains no proportionality principle.”). Justice Scalia, who recently passed away, shared Justice Thomas's view about proportionality. *See Harmelin v. Michigan*, 501 U.S. 957, 985 (1991) (Scalia, J., plurality opinion) (finding “that those who framed and approved the Federal Constitution chose . . . not to include within it the guarantee against disproportionate sentences”).
160. *See Nilsen*, *supra* note 143, at 175 (“By failing to recognize the actual consequences of a prison sentence as punishment, and by creating constitutional tests that deflect and deter Eighth Amendment challenges, the Supreme Court has blindly and cruelly accepted form over substance, thus abdicating its responsibility as a guardian of the Eighth Amendment.”).
161. *See, e.g.,* Taylor, *supra* note 147, at 1816 (“The Court's failure to develop a meaningful Eighth Amendment doctrine in the noncapital context has left a doctrinal vacuum in which the Court's articulation of the proportionality test is . . . so weak that it fails to adequately limit unconstitutional sentences.”).

penalty cases.¹⁶² Then, in *Graham v. Florida*,¹⁶³ the Court struck down the practice of sentencing juvenile offenders to life without the possibility of parole for nonhomicide crimes.¹⁶⁴ The categorical prohibition in *Graham* demonstrates that the Court no longer confines the categorical approach to death penalty cases. Whether *Graham* presages an extension of the categorical analysis to a broad range of prison-term sentences (beyond undeniably harsh life without the possibility of parole sentences)¹⁶⁵ or instead a demarcation of the approach's outer boundary,¹⁶⁶ the precedent has been set for the sentence at issue here.

In order for the Court to undertake the categorical approach, the party challenging a sentencing practice must claim that a government cannot subject to that particular sentence either a person convicted of "a type of crime" or a person who falls within "a class of individuals."¹⁶⁷ *Coker v. Georgia*¹⁶⁸ provides an example of the "type of crime" challenge.¹⁶⁹ In that case, the Court categorically prohibited all jurisdictions

162. See William W. Berry III, *More Different Than Life, Less Different Than Death: The Argument for According Life Without Parole Its Own Category of Heightened Review Under the Eighth Amendment After Graham v. Florida*, 71 OHIO ST. L.J. 1109, 1111 (2010) ("The United States Supreme Court's application of the Eighth Amendment over the past fifty years has clearly divided capital and non-capital cases. This dual approach has rested on the Court's oft-repeated notion that 'death-is-different,' . . ."); *Graham v. Florida*, 560 U.S. 48, 60 (2009) (noting that "previous cases" invoking the categorical approach "involved the death penalty"); *id.* at 61 ("The present case involves an issue the Court has not considered previously: a categorical challenge to a term-of-years sentence.").

163. 560 U.S. 48 (2010).

164. See *Graham*, 560 U.S. at 82 ("The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide."); see also Berry III, *supra* note 162, at 1111–12 ("In *Graham*, the Court applied its 'evolving standards of decency' standard, heretofore reserved for capital cases, to hold that the Eighth Amendment prohibited states from sentencing juvenile offenders to life without parole for non-homicide crimes.").

165. See Jackson, *supra* note 131, at 3188 ("Whether these cases [including *Graham*] foreshadow a broader willingness to take a harder look at the constitutional proportionality of noncapital sentences is uncertain."); Taylor, *supra* note 147, at 1817–18 (noting that the "*Graham* decision[] may suggest a new willingness to expand the Eighth Amendment doctrine").

166. See Berry III, *supra* note 162, at 1126 (making the claim that "life without parole can be clearly differentiated from all other non-capital sentences").

167. Carter, *supra* note 132, at 234; see also *Graham*, 560 U.S. at 60 (explaining that "one [subset of categorical challenges] consider[s] the nature of the offense, the other consider[s] the characteristics of the offender").

168. 433 U.S. 584 (1977) (plurality opinion)

169. *Id.* at 592 (exemplifying a "type of crime" challenge).

from sentencing to death an individual convicted of the crime of rape of an adult woman.¹⁷⁰ It found that the “sentence of death is . . . excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment”¹⁷¹ Examples of cases in which “a class of individuals” was exempted from a punishment include *Atkins v. Virginia*¹⁷² and *Roper v. Simmons*.¹⁷³ In those cases, the Court prohibited jurisdictions from sentencing to death individuals with intellectual disabilities¹⁷⁴ and juvenile offenders (under the age of eighteen at the time of the crime)¹⁷⁵ respectively.

Categorical challenges to a punishment need not separate the “type of crime” and “class of individuals” categories. While the Court historically dealt with challenges involving one or the other, in *Graham*, the Court ruled on a claim that “implicate[d] a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes.”¹⁷⁶ The petitioner successfully combined a claim involving a “class of individuals”—juvenile offenders—and a “type of crime”—all nonhomicide crimes.

A categorical challenge to life without the possibility of parole sentences for individuals convicted of nonviolent offenses represents a challenge based on the type of crime or “nature of the offense.”¹⁷⁷ Put simply, the challenge asserts that because the offenses for which these individuals were sentenced to die in prison were not violent in nature,

170. *See id.* The Court also later held that the death penalty is an unconstitutional punishment for the crime of child rape. *See Kennedy v. Louisiana*, 554 U.S. 407, 446–47 (2008).

171. *Coker*, 433 U.S. at 592.

172. *See Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that the Constitution restricts imposition of the death penalty on persons with intellectual disabilities).

173. *See Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding that the Constitution prohibits imposition of the death penalty on persons under the age of eighteen).

174. *See Atkins*, 536 U.S. at 321 (holding that “we therefore conclude that such punishment is excessive and that the Constitution ‘places a substantive restriction on the State’s power to take the life’ of a mentally retarded offender”). The Court recently explained that although “[p]revious opinions of this Court have employed the term ‘mental retardation,’” the Court now “uses the term ‘intellectual disability’ to describe the identical phenomenon.” *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014). For more information about *Hall*, see Sarma, *supra* note 137, at 201.

175. *See Simmons*, 543 U.S. at 578 (holding that the “Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of [eighteen] when their crimes were committed”).

176. *Graham v. Florida*, 560 U.S. 48, 61 (2010).

177. *Id.* at 60.

the Eighth Amendment prohibits this “second most severe [sentence] known to the law”¹⁷⁸—and the most severe sentence possibly available for those crimes.¹⁷⁹ That the categorical approach is available means that the gross disproportionality approach can be bypassed altogether.

The mere availability of a categorical challenge, however, does not prove that the approach avoids the downsides that attend the gross disproportionality approach. Indeed, a great deal of ink has been spilled in critique of the categorical approach as well.¹⁸⁰ But unlike the gross disproportionality approach, the categorical approach is not incoherent, unstable, and impotent.

In terms of doctrinal coherence, the categorical approach is far better developed and much more stable than its counterpart. To start, only a plurality of justices has adopted the current formulation of the gross disproportionality test that Justice Kennedy crafted in *Harmelin* and Justice O’Connor utilized in *Ewing*.¹⁸¹ By contrast, a majority of justices has repeatedly reaffirmed the Court’s approach to identifying evolving standards of decency and exercising independent judgment of a punishment.¹⁸² Not only does the categorical approach have multiple definite majority opinions establishing the Court’s commitment to it, but it also has proven to be a stable doctrine over a number of cases spanning several years.¹⁸³ And, whereas litigants and courts lack clear

178. *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991) (plurality opinion).

179. *See Kennedy v. Louisiana*, 554 U.S. 407, 437 (2008) (holding the death penalty unconstitutional for nonhomicide offenses against individuals (excluding crimes like terrorism and espionage)).

180. *See, e.g.*, Robert J. Smith, Bidish J. Sarma & Sophie Cull, *The Way the Court Gauges Consensus (and How to Do It Better)*, 35 CARDOZO L. REV. 2397, 2415–18 (2014) (canvassing the critiques of the categorical approach).

181. *See supra* notes 143–144 (explaining how Justice Kennedy’s concurrence in *Harmelin* guides the Court’s application of the Eighth Amendment).

182. *See, e.g.*, *Graham*, 560 U.S. at 61 (describing the Court’s sentencing approach under categorical rules); *Hall v. Florida*, 134 S. Ct. 1986, 1993 (2014) (identifying standards of decency and using the Court’s independent judgment to determine whether to impose the death penalty on people with intellectual disabilities).

183. *See, e.g.*, *Atkins v. Virginia*, 536 U.S. 304, 320 (2002); *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008); *Graham*, 560 U.S. at 60–61 (2010); *Hall*, 134 S. Ct. at 2002–03 (2014) (drawing on the categorical approach to determine the constitutionality of sentencing decisions); *see also* William W. Berry III, *Eighth Amendment Differentness*, 78 MO. L. REV. 1053, 1066 (2013) (“Beginning in 2002, the Court has narrowly decided five cases holding that the Eighth Amendment categorically prohibits a certain type of offender or offense from receiving a certain punishment.”); *see also* Carter, *supra* note 132, at 246 (“Justice Kennedy’s powerful opinions using and defending this test provide consistency and integrity to the Court’s decisions in this area.”).

guidance on how the gross disproportionality approach really applies,¹⁸⁴ “the Court has developed and applied an increasingly sophisticated form of the [categorical] analysis on more than a dozen occasions.”¹⁸⁵ Although one could certainly critique the Supreme Court’s entire Eighth Amendment jurisprudence (including the fact that two separate approaches apply in different contexts),¹⁸⁶ there is no doubt that between the two approaches, the categorical approach is more well-established and more stable.

The categorical approach is also superior because it demonstrates a capacity to detect and strike down punishments that are cruel and unusual. On the other hand, the gross disproportionality approach guts the Eighth Amendment protection because “the Court has treated proportionality as essentially lacking enforceable content in its modern cases concerning other [noncapital] punishments.”¹⁸⁷ It is so weak that one might conclude the *only* viable claim of disproportionality would arise from a life sentence imposed on someone for a parking meter violation.¹⁸⁸ Because gross disproportionality enshrines nearly absolute deference to legislatures that adopt criminal sentencing laws,¹⁸⁹ the

184. *See* *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003) (“Our cases exhibit a lack of clarity regarding what factors may indicate gross disproportionality.”).

185. Smith, Sarma & Cull, *supra* note 180, at 2406.

186. Indeed, many have. *See, e.g.*, Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 477 (2005) (“One would be hard pressed to identify any other area of constitutional law plagued by such confusion at its very roots.”); John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1740 (2008) (“The feeling that modern Eighth Amendment jurisprudence has gone off the rails has arisen, at least in part, from the wildly inconsistent rulings that have emanated from the Supreme Court over the past few decades . . .”).

187. Stacy, *supra* note 186, at 499.

188. *See* *Harmelin v. Michigan*, 501 U.S. 957, 986 n.11 (1991) (plurality opinion); *id.* at 1018 (White, J., dissenting); *Rummel v. Estelle*, 445 U.S. 263, 274 n.11 (1980) (plurality opinion); *id.* at 288 (Powell, J., dissenting) (describing how disproportionate punishment offends the American justice system).

189. *See generally* James J. Brennan, Note, *The Supreme Court’s Excessive Deference to Legislative Bodies Under Eighth Amendment Sentencing Review*, 94 J. CRIM. L. & CRIMINOLOGY 551 (2004) (arguing that the Supreme Court should take a more assertive role against legislation that favors excessive prison sentencing). Some commentators have equated the gross disproportionality test with the notoriously weak and deferential Fourteenth Amendment rational basis test. *See, e.g.*, Lee, *supra* note 143, at 741 (“The deferential nature of the *Ewing* Court’s disjunctive theory renders the prohibition on excessive punishment probably only as strong as a rational basis inquiry would permit, which is not very strong at all.”); Christopher J. DeClue, Comment, *Sugarcoating the Eighth Amendment: The Grossly Disproportionate Test Is Simply the Fourteenth Amendment Rational Basis Test in Disguise*, 41 SW.

categorical approach actually represents a better mechanism to enforce and give some perceptible meaning to the Constitution's ban on cruel and unusual punishments. The fact that several challengers have persuaded the Court to strike down sentencing practices stands in stark contrast to the lone outlier case in which an individual prevailed on a claim of disproportionality.¹⁹⁰

One other major comparative advantage of the categorical approach is that, by definition, it ensures that the Eighth Amendment will apply uniformly across the country.¹⁹¹ The gross disproportionality test requires individual judges to make case-specific Eighth Amendment determinations on a case-by-case basis.¹⁹² The categorical approach, on the other hand, empowers the U.S. Supreme Court to make binding determinations followed by all other courts.¹⁹³ To the extent that uniformity is a key value in the context of constitutional interpretation, the categorical approach protects that value, and the gross disproportionality approach sacrifices it, at least in theory.¹⁹⁴

L. REV. 533, 570 (2012) ("In 1993, Justice Stevens described the Fourteenth Amendment rational basis test as 'tantamount to no review at all.' It is time for the Court to accept that the grossly disproportionate test is no different, and, by doing so, the Court must admit that the grossly disproportionate test is simply a rational basis test in disguise.") (footnote omitted).

190. Barkow, *supra* note 133, at 1160 ("There has been only a single case in the Court's history in which a term of incarceration, standing alone, was held to be disproportionate to an otherwise validly defined crime."). *See* Solem v. Helm, 463 U.S. 277 (1983) (holding that a sentence to life imprisonment without possibility of parole was disproportionate to the defendant's relatively minor criminal offense); *see also* Berry III, *supra* note 183, at 1065 ("*Solem*, though, is an outlier in light of the Court's decisions [concerning] . . . similar cases of disproportional sentences in non-capital cases.").

191. *See, e.g.*, Carter, *supra* note 132, at 231 (explaining that "categorical bars completely preclude the death penalty when they apply"); *Gregg v. Georgia*, 428 U.S. 153, 176 (1976) (plurality opinion) ("A decision that a given punishment is impermissible under the Eighth Amendment cannot be reversed short of a constitutional amendment.").

192. *Graham v. Florida*, 560 U.S. 48, 77 (2010) (contrasting the Court's categorical approach with the "case-specific gross disproportionality inquiry"); *see also* *Ewing v. California*, 538 U.S. 11, 52 (2003) (Breyer, J., dissenting) ("[A]pplication of the Eighth Amendment to a sentence of a term of years requires a case-by-case approach.").

193. *See Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion) ("[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the [] penalty under the Eighth Amendment.").

194. *See supra* notes 150–161 and accompanying text (explaining why in practice very few courts ever find any punishment grossly disproportionate to the crime). There is near uniformity on the ground because the Court

The inadequacies that plague the gross disproportionality approach render it an unsuitable vehicle for considering the claim that it is unconstitutional to sentence individuals convicted of nonviolent offenses to life without the possibility of parole. Because the constitutional issue here provides a clear category upon which to base a categorical challenge and because the categorical approach is far better equipped to deal meaningfully with the emerging facts, the appropriate Eighth Amendment framework is clear. The questions that remain are whether the Supreme Court should find that a national consensus against the sentencing practice exists, and, if it does, whether it should also find in its independent judgment that the punishment is unconstitutional.

III. EVALUATING THE CASE FOR AN EIGHTH AMENDMENT CATEGORICAL BAN OF LIFE WITHOUT THE POSSIBILITY OF PAROLE SENTENCE FOR INDIVIDUALS CONVICTED OF NONVIOLENT OFFENSES

This Part evaluates the strength of the claim that the Eighth Amendment categorically prohibits life without parole sentences for individuals convicted of nonviolent offenses.¹⁹⁵ This Part proceeds in two subparts: the first evaluates whether a national consensus against the sentencing practice exists and the second evaluates whether the Supreme Court's independent judgment would support either the elimination or retention of the challenged practice. These sub-parts correspond to the two inquiries the Court undertakes when dealing with categorical challenges.¹⁹⁶ This Part concludes that evolving standards of decency have evolved to the point that the Court could strike down the punishment.

A. *Evaluating Objective Evidence of a National Consensus*

To determine whether a national consensus exists, the Supreme Court “considers a number of factors . . . : the number of [jurisdictions] that authorize the punishment; legislative direction of change; the

has interpreted the proportionality principle so narrowly that the discretion of individual judges on a case-by-case basis is quite limited.

195. This Part in particular relies heavily on the ACLU's report, “A Living Death: Life Without Parole for Nonviolent Offenses.” *Supra* note 4. Though the report was issued in 2013, for reasons explored in more depth below, we believe that the numbers relevant to the categorical approach have not changed significantly and have not changed in a way that would alter the outcome of the test.

196. *See supra* note 139 and accompanying text (describing the Court's two inquiries as (1) the social standards reflected in legislative enactments and state practices and (2) the constitutionality of the punishment).

number of sentences imposed; . . . and the degree of geographic isolation.”¹⁹⁷ These factors help the Court determine accurately whether a particular punishment has fallen out of favor. Each of these factors is considered below in turn.

1. The Number of Jurisdictions That Authorize the Punishment
and the Number That Prohibit It

As part of its consensus analysis, the Supreme Court has always considered the number of jurisdictions—counting all of the states and the federal government—that legislatively authorize the punishment. According to the Court, “the legislative judgment weighs heavily in ascertaining such standards.”¹⁹⁸ The number of jurisdictions that prohibit a punishment is not necessarily an outcome-determinative factor, but it can “weigh[] very heavily” in favor of an Eighth Amendment prohibition, especially if the number reflects a vast majority.¹⁹⁹

At the time the ACLU published its report on life without parole sentences for nonviolent offenders, the federal government and “22 states permit[ted] LWOP sentences for certain nonviolent crimes.”²⁰⁰ In other words, twenty-eight states did not permit the punishment. Looking at the cases in which the Court has found a consensus against a punishment, they indicate that, given the numbers here, this factor does

197. Smith, Sarma & Cull, *supra* note 180, at 2406.

198. *Gregg v. Georgia*, 428 U.S. 153, 175 (1976) (plurality opinion); *see also* *Roper v. Simmons*, 543 U.S. 551, 564 (2005) (stating that “[t]he beginning point [of the Eighth Amendment analysis] is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question”); *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) (indicating that the “clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures”), *abrogated by* *Atkins v. Virginia*, 536 U.S. 304, 312 (2002).

199. *See Coker v. Georgia*, 433 U.S. 595–96 (1977) (plurality opinion) (“The upshot is that Georgia is the sole jurisdiction in the United States at the present time that authorizes a sentence of death when the rape victim is an adult woman The current judgment with respect to the death penalty for rape is not wholly unanimous among state legislatures, but it obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman.”).

200. TURNER & BUNTING, *supra* note 4, at 23; *see also id.* at 39 (listing the jurisdictions that permit life without parole for certain nonviolent offenses: Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nevada, North Dakota, Oklahoma, South Carolina, South Dakota, Virginia, Wisconsin, Wyoming, and the federal government). This number is comparable to a determination of the number of states that permit life without parole for nonviolent offenses done in a 2013 law review Note. *See generally* Hall, *supra* note 63 (indicating that twenty-two states and the federal government authorize the punishment).

not weigh heavily in favor of striking down the punishment. For example, in *Coker*, Georgia was the only jurisdiction that permitted the challenged punishment.²⁰¹ In *Kennedy*, the Court found that forty-four states did not permit the challenged punishment.²⁰² Unlike *Kennedy* and *Coker*, the number of jurisdictions that prohibit life without parole for nonviolent offenses does not approach a level that demonstrates to the Court that legislatures have almost universally rejected the punishment.

While the count of twenty-eight does not compare as favorably to the head counts in *Coker* and *Kennedy*, in both *Atkins* and *Simmons* the Court found that thirty states disallowed the execution of members of the relevant class of offenders.²⁰³ And, in *Graham*, “the Court ultimately found a national consensus even though it tallied only thirteen jurisdictions that banned life without parole for juveniles.”²⁰⁴ Here, the number itself—twenty-eight—is not dispositive. Given that the Court proceeded to evaluate other factors in *Graham* (which only had a count of thirteen), and detected a national consensus in *Atkins*, *Simmons*, and *Graham*, the fact that more than half of the jurisdictions in the country do not permit life without parole sentences for nonviolent offenses makes clear that a meaningful analysis of other consensus factors is warranted.²⁰⁵

201. *Coker*, 433 U.S. at 595–96 (plurality opinion).

202. *Kennedy v. Louisiana*, 554 U.S. 407, 423 (2008).

203. *Simmons*, 543 U.S. at 564 (“When *Atkins* was decided, [thirty] States prohibited the death penalty for the mentally retarded By a similar calculation in this case, [thirty] States prohibit the juvenile death penalty”).

204. Smith, Sarma & Cull, *supra* note 180, at 2407–08.

205. The other factors should be evaluated for an additional reason. As explored in Part I, some legislatures that made it possible to punish individuals convicted of nonviolent offenses through life without parole sentences may not have been targeting the particular offenders who have actually been punished accordingly. Instead, law enforcement officials have enforced textually overbroad laws to punish individuals that legislators may have never envisioned. *See, e.g.*, MANDATORY MINIMUM PENALTIES 2011, *supra* note 32, and accompanying text (describing legislation that Congress passed without its usual deliberation in order to rapidly respond to a high-profile criminal act, thereby overlooking the full impact of the legislation). This concept touches on a strand of the Eighth Amendment consensus jurisprudence that has arisen in previous cases at the Supreme Court. The Court has reasoned that it cannot divine legislators’ intentions where the statutory scheme that renders a person eligible for the challenged punishment does so by circuitous or indirect means. *See, e.g.*, *Graham v. Florida*, 560 U.S. 48, 66–67 (2010) (“The Court confronted a similar situation in *Thompson*, where a plurality concluded that the death penalty for offenders younger than [sixteen] was unconstitutional. A number of States then allowed the juvenile

2. The Direction of Legislative Change

The Court looks beyond the number of jurisdictions that authorize or prohibit a punishment and assesses the direction in which jurisdictions are moving. In *Atkins*, the Court held that “[i]t is not so much the number of these States [that prohibit the sentencing practice] that is significant, but the consistency of the direction of change.”²⁰⁶ In making the assessment about the direction of change, the Court evaluates whether jurisdictions have prohibited the challenged sentencing practice and whether others have reinstated or entrenched it.²⁰⁷ “The Court’s analysis thus searches for uniformity in the direction, along with some (undefined) number of jurisdictions to undergird that shift.”²⁰⁸

death penalty if one considered the statutory scheme. As is the case here, those States authorized the transfer of some juvenile offenders to adult court; and at that point there was no statutory differentiation between adults and juveniles with respect to authorized penalties. The plurality concluded that the transfer laws show ‘that the States consider [fifteen]-year-olds to be old enough to be tried in criminal court for serious crimes (or too old to be dealt with effectively in juvenile court), *but tells us nothing about the judgment these States have made regarding the appropriate punishment for such youthful offenders.*’ . . . The same reasoning obtains here. Many States have chosen to move away from juvenile court systems and to allow juveniles to be transferred to, or charged directly in, adult court under certain circumstances. Once in adult court, a juvenile offender may receive the same sentence as would be given to an adult offender, including a life without parole sentence. But the fact that transfer and direct charging laws make life without parole possible for some juvenile nonhomicide offenders does not justify a judgment that many States intended to subject such offenders to life without parole sentences [T]he many States that allow life without parole for juvenile nonhomicide offenders but do not impose the punishment should not be treated as if they have expressed the view that the sentence is appropriate.” (citations omitted); *Miller v. Alabama*, 132 S. Ct. 2455, 2472 (2012) (“We reasoned that in those circumstances, it was impossible to say whether a legislature had endorsed a given penalty”). As one commentator has explained, “*Graham* and *Miller* also indicate that inadvertence in authorizing a challenged sentence may diminish the deference that would normally be shown to legislative policy choices.” O’Hear, *supra* note 27, at 1126.

206. *Atkins v. Virginia*, 536 U.S. 304, 315 (2002).

207. See Smith, Sarma & Cull, *supra* note 180, at 2410 (“In *Atkins*, the Court noted that a ‘large number of States’—sixteen—took the death penalty off the table for mentally retarded offenders after the Court rejected the Eighth Amendment claim in *Penry v. Lynaugh*, and there was a ‘complete absence of States passing legislation reinstating’ the penalty for the same class of individuals. The Court also relied on ‘direction’ in *Simmons*, holding that ‘the same consistency of direction of change’ had ‘been demonstrated’ where no state reinstated the juvenile death penalty after *Stanford v. Kentucky* and five states prohibited it in fifteen years.”) (footnotes omitted).

208. *Id.*

There is widespread evidence that many jurisdictions have recently adopted laws that cut back on harsh mandatory minimum sentencing laws and habitual offender laws that historically have rendered non-violent offenders eligible for life without parole sentences.²⁰⁹ Aside from California, however, it seems that no jurisdiction has passed a discrete law that specifically addresses the narrow sentencing practice at issue here. This does not mean that other jurisdictions have not also amended certain statutes to take life without parole off the table for nonviolent offenses; rather, it speaks to the difficulty of tracking such changes over time when statutes may provide for these sentences in a variety of ways. For example, a life without parole sentence may be imposed through mandatory minimums on the front-end or created through the abolition of parole on the back-end. Unlike other sentencing practices considered by the Court under the Eighth Amendment—which have generally been confined to a jurisdiction’s murder statutes—the difficulty of identifying nonviolent life without parole-eligible offenses renders traditional “head counting” of states much more difficult. For this reason, an examination of actual usage of the punishment—how often the sentence is imposed—provides a more readily available and reliable gauge.

Political and legislative movement away from the types of laws that resulted in the lifetime incarceration of nonviolent offenders may still play a critical role in the consensus analysis. The evidence of such a movement was set out in Part I.D. It includes the President’s recent grants of clemency, state legislative reforms, and public statements from leading officials. There appear to be three possible avenues for this evidence to influence the Court. First, the Court could consider it relevant to the direction of legislative change factor even if the evidence is not totally on-point because it is not tailored to provide relief to individuals convicted of nonviolent offenses.²¹⁰ Second, the Court could

209. *See supra* Part I.D.4 (describing a nationwide trend to rollback penalties imposed under mandatory minimum laws).

210. This might seem incongruous given that the Court has not attributed full-blown intent to legislatures that have made individuals eligible for certain punishments through complicated statutory schemes. *See supra* note 205. Although it might be odd for the Court to find that laws one or two steps removed from the question cannot be relied upon in one circumstance but can in the other, “[t]he Court’s recent history demonstrates a steady extension in the Eighth Amendment’s reach.” Ian P. Farrell, *Abandoning Objective Indicia*, 122 YALE L.J. ONLINE 303, 309 (2013). In fact, the Court has previously considered it persuasive that jurisdictions have passed laws making the punishment available but not for the type of offenses that define the constitutional challenge. *See* *Enmund v. Florida*, 458 U.S. 782, 792 (1982) (“Moreover, of the eight States which have enacted new death penalty statutes since 1978, none authorize capital punishment in such circumstances.”). If certain jurisdictions have made life without parole available for some crimes but not nonviolent offenses that may be a

consider this evidence relevant not to the legislative trend factor but instead to its independent judgment.²¹¹ And, third, the Court could draw upon evidence related to these changes that fits more neatly into one of its doctrinal factors. For example, states that have recently passed laws prohibiting mandatory life without parole sentences for drug crimes will sentence fewer nonviolent offenders to the punishment moving forward. This means that the evidence of the broader movement has specific effects that the consensus analysis can detect through its determination of the number of sentences actually imposed.

3. The Number of Sentences Imposed

The Supreme Court's consensus analysis does not end with the simple categorizing and tallying of jurisdictions' statutes; the Court also evaluates a "challenged penalty's usage when it decides the national consensus question."²¹² Actual sentencing practices have long mattered in this context,²¹³ and recent cases demonstrate that a jurisdiction's usage of a legislatively authorized punishment can matter as much, if not more, than the fact that a statute permits it. In 2010:

Sentencing practices . . . played an important—perhaps decisive—role in the Court's decision in *Graham* to bar life without the possibility of parole sentences for juveniles who commit nonhomicide offenses. More than three-dozen jurisdictions legislatively authorized life without parole . . . for juveniles who commit nonhomicide offenses. Florida argued that this widespread display of legislative support for the punishment foreclosed a finding that a consensus against the punishment exists. The Court labeled Florida's argument "incomplete and unavailing" and reiterated

development the Court considers. According to the ACLU, "LWOP is now used in [forty-nine] states," but individuals convicted of nonviolent offenses have received such sentences in only nine states. TURNER & BUNTING, *supra* note 4, at 20–23.

211. See, e.g., *infra* Part III.B (evaluating the factors that the Court considers when exercising independent judgment). The independent judgment prong of the evolving standards of decency test is capacious and enables the Court to even consider evidence about the state of international law. See Roger P. Alford, *Roper v. Simmons and Our Constitution in International Equipose*, 53 UCLA L. REV. 1, 26 (2005) ("[T]he Court in *Roper* is suggesting that international equipose may be invoked to confirm the Court's independent judgment of what the Constitution requires."). Under this prong, the Court could certainly give some, even if little, weight to the state-level legislative developments on habitual offender and mandatory minimum sentencing laws.

212. Smith, Sarma & Cull, *supra* note 180, at 2411.

213. See *id.* at 2411–13 (explaining how the Court considers the penalty's actual usage to determine whether there is a national consensus against a punishment).

that “[a]ctual sentencing practices are an important part of the Court’s inquiry into consensus.” Where only 129 juvenile offenders were under a sentence of LWOP, the Court indicated there was “a consensus against its use.”²¹⁴

In situations in which a statute authorizes a particular challenged sentencing practice but the jurisdiction never or rarely utilizes it, the Court can look past the legislation itself to find that the lack of usage better reflects evolving standards of decency.

In earlier cases, the Court’s usage analysis in consensus cases sometimes revealed that the challenged sentencing practice had been applied to literally a handful of individuals nationwide.²¹⁵ *Graham* clarified that the number of sentences handed down should be compared to the baseline number of defendants potentially eligible for the challenged sentence. “While more common in terms of absolute numbers than the sentencing practices in [other Eighth Amendment cases like *Enmund* and *Atkins*], the type of sentence at issue is actually as rare as those other sentencing practices when viewed in proportion to the opportunities for its imposition.”²¹⁶ The Court thus determined that the 123 juvenile offenders sentenced to life without parole for non-homicide crimes received a punishment “as rare” as the handful of death sentences highlighted in previous cases because in the year 2007 alone juveniles were arrested for over 380,000 aggravated assaults, forcible rapes, robberies, burglaries, drug offenses and arson.²¹⁷ “Such infrequency in the imposition of a challenged sentence makes clear that

214. *Id.* at 2412–13 (footnotes omitted); *see also* Sarma, *supra* note 137, at 199 (noting that the Court’s 2014 decision in *Hall* “deepens the Court’s commitment to analyzing usage indicators to determine if a state’s legislative authorization of a punishment is a meaningful reflection of that state’s popular will”).

215. *See, e.g., Enmund*, 458 U.S. at 796 (finding relevant that “only three persons in that category [where the defendant did not commit the homicide, was not present when the killing took place, and did not participate in a plot or scheme to murder] are presently sentenced to die”); *Kennedy v. Louisiana*, 554 U.S. 407, 434 (2008) (finding it relevant that there were “only two individuals now on death row in the United States for a nonhomicide offense”).

216. *Graham v. Florida*, 560 U.S. 48, 49 (2010).

217. *See id.* at 65 (calculating the total number of arrests for aggravated assault, rape, robbery, burglary, drug offenses, and arson in 2007); *see also* *Miller v. Alabama*, 132 S. Ct. 2455, 2478–79 (2012) (Roberts, C.J., dissenting) (“The Court notes that *Graham* found a punishment authorized in [thirty-nine] jurisdictions unconstitutional, whereas the punishment it bans today is mandated in [ten] fewer. But *Graham* went to considerable lengths to show that although theoretically allowed in many States, the sentence at issue in that case was ‘exceedingly rare’ in practice. The Court explained that only 123 prisoners in the entire Nation were serving life without parole for nonhomicide crimes committed as juveniles, with more than half in a

overturning the sentence will not impose major disruptions on the day-to-day functioning of state criminal justice systems”²¹⁸

Two numbers seem to matter most in the analysis of sentencing practices: (1) the number of people who are sentenced to the challenged punishment; and (2) the number of people who are eligible to be sentenced to the challenged punishment. The first number may be thought of as the “numerator” and second number the “denominator” because dividing the first number by the second reveals (an estimate of) the percentage of individuals eligible for a punishment that actually receive it. The numbers generate for the Court a rough idea of how “unusual” a punishment is in reality.

Here, the relevant numerator appears to be in the ballpark of 3,300 to 4,500 prisoners. According to the ACLU “as of 2012, there were 3,278 prisoners serving life without parole for nonviolent drug and property crimes in the federal system and in nine states that provided such statistics”²¹⁹ That number may be somewhat higher because, as the ACLU acknowledges, “there may well be more such prisoners in [three] other states” that permit the challenged punishment but did not disclose information.²²⁰ If one assumes for the sake of argument that the three jurisdictions that did not share information each had an average of 328 inmates under the sentence—the average determined by the 3,278 prisoners across the ten reporting jurisdictions—there would be an additional 984 relevant sentences. That estimate, likely a significant overestimate (given that the 3,278 figure includes the federal government’s count of more than 2,000 offenders), would put the total number at 4,262. For the analysis here—a highly conservative one—we shall assume there are 4,500 prisoners serving life without parole for non-violent offenses.

Initially, the total number of sentences at issue seems dramatically higher than in the other Eighth Amendment categorical ban cases. It is far beyond the two offenders in *Kennedy*, three offenders in *Enmund*,

single State. It contrasted that with statistics showing nearly 400,000 juveniles were arrested for serious nonhomicide offenses in a single year. Based on the sentence’s rarity despite the many opportunities to impose it, *Graham* concluded that there was a national consensus against life without parole for juvenile nonhomicide crimes.”) (citations omitted).

218. O’Hear, *supra* note 27, at 1099.

219. TURNER & BUNTING, *supra* note 4, at 2; *id.* at 20 (“According to data collected and analyzed by the ACLU, 3,278 prisoners are serving LWOP for drug, property, and other nonviolent crimes in the United States as of 2012.”).

220. *Id.* at 2; *see id.* at 24 (noting that Delaware, Virginia, and Nevada did not give ACLU data but have life without parole for nonviolent offenses, so “the total number of nonviolent LWOP prisoners nationwide is likely higher than the ACLU’s data suggests”).

and even the 123 in *Graham*.²²¹ But, to be understood, the number must be contextualized; the numerator requires a denominator to obtain real meaning under this analysis. Indeed, it is when one tries to determine the denominator that the initial image gets shattered. The almost astronomical size of the denominator demonstrates that life without parole sentences for nonviolent offenses ranks among the rarest sentences the Court has seen.

It is impossible to drum up an accurate guess for the number of nonviolent offenses (as defined earlier in this Article) that occur in any given year. In *Graham*, the Court faced a similar challenge of giving “attention . . . to the base number of certain types of offenses” and it utilized the statistics that were readily available.²²² As a starting place, the Uniform Crime Reports (UCR) compiled by the Federal Bureau of Investigation (FBI) provide a yearly breakdown of property crimes. According to the FBI, property crime statistics “include[] the offenses of burglary, larceny-theft, [and] motor vehicle theft”²²³ In 2013, “there were an estimated 8,632,512 property crime offenses in the nation.”²²⁴ This total provides a very conservative estimate because it does not include any drug possession or distribution offenses. The UCR separately provides information about the number of arrests in a given year for particular categories of crime. This number includes information about arrests for drug abuse violations; in 2013, there were an estimated 1,501,043 arrests for this category of crimes.²²⁵ Creating the most conservative estimate, we can assume a one hundred percent arrest rate for drug abuse violations and that arrests occurred one-to-one for each drug crime. In other words, assume there were 1,501,043 drug crimes. Combined with the 8,632,512 property crimes, that would create a total estimate of 10,133,555 crimes for 2013 alone.²²⁶

221. *Supra* notes 215–217.

222. *Graham*, 560 U.S. at 65.

223. *Crime in the United States 2013: Property Crime*, FED. BUREAU OF INVESTIGATION (2013) https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/property-crime/property-crime-topic-page/propertycrimemain_final [<https://perma.cc/RDE6-X742>].

224. *Id.*

225. *Crime in the United States 2013: Persons Arrested*, FED. BUREAU OF INVESTIGATION (2013) <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/persons-arrested/persons-arrested> [<https://perma.cc/T9PD-D4ZD>].

226. The fact that jurisdictions have been handing down the challenged punishment over the span of the past few decades is highly relevant. *See Graham*, 560 U.S. at 65 (“The numbers cited above reflect all current convicts in a jurisdiction’s penal system, regardless of when they were convicted. It becomes all the more clear how rare these sentences are, even within the jurisdictions that do sometimes impose them, when one considers that a

Even though it is extraordinarily difficult if not impossible to determine how many of these more than 10 million crimes would have made a nonviolent offender eligible for a life sentence, the number is still instructive. Dealing with a similar dilemma in *Graham*, the Court found that:

Although it is not certain how many of these numerous [~400,000] juvenile offenders were eligible for life without parole sentences, the comparison suggests that in proportion to the opportunities for its imposition, life without parole sentences for juveniles convicted of nonhomicide crimes is as rare as other sentencing practices found to be cruel and unusual.²²⁷

Here, too, the “comparison suggests” that life without parole sentences for nonviolent offenses are as rare as those juvenile life without parole punishments for nonhomicide crimes the Court held unconstitutional. Dividing the numerator by the denominator in *Graham* (123/380,480) yields a 0.0323% sentencing rate. Here, that same calculation (4,500/10,133,555) yields a 0.0444% sentencing rate. Both numbers represent very rough estimates; both numbers are infinitesimal; and both numbers reflect the sort of profoundly infrequent use that troubles the Court.²²⁸ Therefore, this factor—the number of sentences imposed—should weigh strongly in favor of an Eighth Amendment ban on the punishment.

juvenile sentenced to life without parole is likely to live in prison for decades. Thus, these statistics likely reflect nearly all juvenile nonhomicide offenders who have received a life without parole sentence stretching back many years.”).

227. *Graham*, 560 U.S. at 65–66.

228. In *Furman v. Georgia*, a plurality expressed concern that the death penalty was so infrequently applied that it was cruel and unusual where it estimated that only fifteen to twenty percent of eligible offenders received the punishment. 408 U.S. 238, 386 n.11 (1972) (Burger, C.J., dissenting) (“Although accurate figures are difficult to obtain, it is thought that from [fifteen percent] to [twenty percent] of those convicted of murder are sentenced to death in States where it is authorized.”); see also Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. REV. 1283, 1288 (1997) (“[T]he Justices’ conclusion that the death penalty was imposed only infrequently derived from their understanding that only [fifteen to twenty percent] of convicted murderers who were death-eligible were being sentenced to death”). That sentencing rate is roughly 337 to 450 times greater than the 0.0444% rate for nonviolent life without parole offenders generated above.

4. The Degree of Geographic Isolation

A factor the Court implicitly considers when dealing with a categorical challenge is the degree of the challenged punishment's geographic isolation.²²⁹ "Geographic isolation describes when a relatively small number of jurisdictions that authorize a punishment become responsible for the vast majority of the contested sentences imposed."²³⁰ This factor played a major role in *Graham* where the Court found that one jurisdiction had sentenced "[a] significant majority" of the individuals serving the challenged punishment.²³¹ All of the remaining sentences had come from "just 10 states."²³²

The geographic distribution of sentences in *Graham* was particularly important because thirty-nine jurisdictions (thirty-seven states plus the District of Columbia and the federal system) statutorily permitted the challenged punishment.²³³ However, the Court found significant the "[a]ctual sentencing practices," which revealed that "only 11 jurisdictions nationwide in fact impose life without parole sentences on juvenile nonhomicide offenders—and most of those do so quite rarely—while 26 States, the District of Columbia, and the Federal Government do not impose them despite apparent statutory authorization."²³⁴ Geographic isolation and infrequent usage combined in *Graham* to undermine the states' claim that there was no consensus against a punishment because of the sheer number of jurisdictions that technically permitted it.

Life without parole sentences for nonviolent offenders share a similar distributive pattern to the sentences struck down in *Graham*. To start, the number of jurisdictions that actually utilize the sentence is much lower than the number that technically authorize it. "In nine of these [twenty-two] states [and in the federal system], prisoners are currently serving life-without-parole sentences for a nonviolent offense"²³⁵ That number decreased by one in 2015 because Missouri

229. Smith, Sarma & Cull, *supra* note 180, at 2414 ("Although the Court has not explicitly considered geographic isolation as an independent variable in the national consensus analysis (as apart from the number of states that authorize a punishment), the Eighth Amendment cases indicate that it plays a role.").

230. *Id.*

231. *Graham*, 560 U.S. at 64 (relying on the fact that 77 of the 123 sentences had been handed down in Florida).

232. *Id.*

233. *Id.* at 62.

234. *Id.* at 62–64.

235. TURNER & BUNTING, *supra* note 4, at 23; *see also id.* at 39 (showing the nine states are Alabama, Florida, Georgia, Illinois, Louisiana, Mississippi, Missouri, Oklahoma, and South Carolina).

removed the lone prisoner under such a sentence.²³⁶ In other words, fourteen of the twenty-three authorizing jurisdictions do not actually use the punishment.²³⁷ Moreover, where Florida was responsible for a majority of sentences at issue in *Graham*, “[n]early two-thirds of these prisoners [sentenced to life without parole for nonviolent offenses]—sixty-three percent—are in the federal system.”²³⁸ Only eight other jurisdictions use the challenged punishment.²³⁹

5. Summary of the National Consensus Analysis

The case that there is now a national consensus against life without parole sentences for nonviolent offenses appears even stronger than the consensus evidence that prevailed in *Graham*. Substantially more jurisdictions—fifteen additional states—prohibit the challenged punishment. While the total number of individuals eligible for relief is far greater here, the proportion of individuals under the sentence compared to the relevant baseline crime statistics strongly suggests that both sentences are exceedingly rare.²⁴⁰ Finally, the evidence of geographic isolation here is nearly identical to the evidence in *Graham*: less than half of the jurisdictions that permit the punishment actually deploy it, and one jurisdiction in particular generates a significant percentage of the sentences. Against this backdrop, it appears that there is more than enough evidence to support a judicial finding that there is a national consensus against life without parole sentences for nonviolent offenses.

B. Evaluating the Supreme Court’s Independent Judgment

In exercising its independent judgment, the Supreme Court considers “the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question In this inquiry the Court also considers whether the challenged sentencing practice serves legitimate penological goals.”²⁴¹

236. See Nelson, *supra* note 84 (explaining that the only prisoner serving life without parole for a nonviolent offense was released in 2015).

237. See TURNER & BUNTING, *supra* note 4, at 16 (explaining that this number may actually be eleven, twelve, thirteen, or fourteen because three states did not respond to the ACLU’s records requests).

238. *Id.* at 23.

239. See *id.* at 22 Table 2 (showing the distribution of sentences in 2012).

240. See also *Graham v. Florida*, 560 U.S. 48, 65 (2010) (noting that these numbers need to be put in the context of the span of many years in which individuals could be receiving these life without parole sentences).

241. *Id.* at 67.

1. The Culpability of the Offenders in Light of Their Crimes

Culpability matters. In evaluating categorical challenges, the Court's culpability analysis turns on whether the challenge is based on "characteristics of the offender" or "the nature of the offense."²⁴² In challenges based on characteristics that define a specific class of offenders, the Court has not sought to determine a specific offender's level of culpability; instead, it has drawn conclusions about culpability based on characteristics that generally apply to members within the class. In *Simmons* and *Graham*, that class of offenders was juvenile offenders;²⁴³ in *Atkins* and *Hall*, the class consisted of offenders with intellectual disabilities.²⁴⁴ With respect to both classes, the Court found substantial reasons to treat their culpability as relatively limited, particularly when compared to fully functioning adult offenders.

For challenges based on the nature of the offense, the Court assesses the severity of the crime in light of the sentence. In *Coker*, the Court explained that the serious crime of rape deserves a weighty punishment but not a punishment that was only otherwise available for the undoubtedly more grave crime of murder. According to the Court:

Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. . . . We have the abiding conviction that the death penalty, which 'is unique in its severity and irrevocability,' . . . is an excessive penalty for the rapist who, as such, does not take human life.²⁴⁵

The Court revisited the point in *Kennedy*, stating that with respect to capital punishment "there is a distinction between intentional first-

242. *Id.* at 60.

243. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (noting that juveniles have a "lack of maturity and an underdeveloped sense of responsibility" (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993))); *id.* (noting that "juveniles are more vulnerable or susceptible to negative influences and outside pressures"); *id.* at 570 (noting that "the character of a juvenile is not as well formed as that of an adult").

244. *See, e.g.*, *Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (noting that offenders with intellectual disabilities "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others").

245. *Coker v. Georgia*, 433 U.S. 584, 598 (1977) (plurality opinion) (quoting *Gregg v. Georgia*, 428 U.S. 153, 187 (1976)).

degree murder on the one hand and nonhomicide crimes against individual persons . . . on the other.”²⁴⁶

To date, the Court has not considered a categorical challenge based on the nonviolent nature of the offenses. There is no doubt that these offenses stand in stark contrast to the murders, rapes, and robberies contemplated in the earlier landmark Eighth Amendment cases. Nonviolent crimes are not even crimes against individual persons as the Court described in *Kennedy* because by definition the offenses involve no harm or threat of harm to people.²⁴⁷ In an important way, these offenses are thus two full steps removed from the homicide crimes that in some circumstances warrant capital punishment and one step removed from the violent nonhomicide crimes for which the Court has found the death penalty unconstitutional. It follows that the Court would and should recognize (and perhaps even constitutionalize) the distinction between crimes against persons and nonviolent offenses.²⁴⁸

2. The Severity of the Punishment in Question

Another consideration relevant to the independent judgment analysis is the severity of the punishment. The precedent indicates that the Court’s evaluative posture can be described in the following way: the more serious the punishment, the more serious the scrutiny. On several occasions, “[t]he Court has recognized the severity of sentences that deny convicts the possibility of parole.”²⁴⁹ In *Graham*, the Court described how life without parole sentences share important similarities to death sentences: “The State does not execute the offender sentenced to life without parole, but the sentence alters the offender’s life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration”²⁵⁰ The Eighth Amendment cases suggest that the Court will apply substantial independent scrutiny to the life without parole sentences at issue. In short, the Court

246. *Kennedy v. Louisiana*, 554 U.S. 407, 438 (2008).

247. *See* TURNER & BUNTING, *supra* note 4, at 18 (defining “nonviolent offenses”).

248. According to at least one commentator, the Court has already relied on the distinction several times in the gross disproportionality context. *See* Kevin White, Comment, *Construing the Outer Limits of Sentencing Authority: A Proposed Bright-Line Rule for Noncapital Proportionality Review*, 2011 B.Y.U. L. REV. 567, 587 (2011) (“[T]he fundamental distinction of whether an offense is nonviolent or violent has constituted a significant factor, if not the most significant factor, in the Court’s assessment of the gravity of crimes.”).

249. *Graham v. Florida*, 560 U.S. 48, 70 (2010).

250. *Id.* at 69–70; *see also* Berry III, *supra* note 162, at 1112 (“A sentence of life imprisonment without the possibility of parole is in many ways no more than a death sentence without an execution date.”).

recognizes that this punishment is “the second most severe penalty permitted by law” and the most severe punishment available for nearly all crimes but murder.²⁵¹

3. The Validity or Invalidity of Penological Goals

The Court’s independent judgment analysis evaluates whether a challenged punishment serves any legitimate penological goals. Four traditional goals and justifications for punishment have garnered the Court’s recognition: deterrence, retribution, rehabilitation, and incapacitation.²⁵² This Part considers each in turn.

a. Deterrence

Deterrence is a justification for punishment premised on the theory that the punishment can deter individuals from breaking the law. Two aspects in particular may contribute to a punishment’s potential effectiveness as a deterrent – the certainty that the punishment will apply and the severity of the punishment.

The severity of a life without parole sentence is nearly without match. One might be tempted to believe that this maximally harsh sentence would thus clearly yield the greatest deterrent value when compared to other punishments. However, “there is little evidence that increases in the length of already long prison sentences yield general deterrent effects that are sufficiently large to justify their social and economic costs.”²⁵³ Indeed, the general proposition that sentence severity effectively deters crime is being called into question. Years of research and results from study after study have led many criminologists to conclude “[t]here is no plausible body of evidence that supports policies based on this premise [that harsh sentences deter]”²⁵⁴

Compared to punishment severity, the certainty of punishment is much more likely to provide a deterrent effect.²⁵⁵ According to a leading expert on deterrence, “evidence in support of the deterrent effect of various measures of the certainty of punishment is far more convincing

251. *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in judgment).

252. *Ewing v. California*, 538 U.S. 11, 25 (2003).

253. Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 201 (2013).

254. Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143, 146 (2003).

255. Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765, 818 (2010) (“[T]here does seem to be a modest inverse relationship between the perceived certainty of punishment and crime, but no real evidence of a deterrent effect for severity”).

and consistent than for the severity of punishment.”²⁵⁶ Yet, the type of certainty that generally accepted research has demonstrated can have a deterrent effect is an offender’s certainty that he will be apprehended.²⁵⁷ This type of certainty should be distinguished from the certainty that a particular sentence will be given. “Consequently, the conclusion that certainty, not severity, is the more effective deterrent is more precisely stated as *certainty of apprehension* and not the severity of the legal consequence ensuing from apprehension is the more effective deterrent.”²⁵⁸ In other words, harsh sentencing regimes like life without parole have not been proven to have deterrent effects along the certainty dimension.

With respect to life without parole sentences for nonviolent crimes, there are reasons to believe that certainty does not play a meaningful role in deterring offenders. To the extent perceptions reflect reality in the deterrence realm,²⁵⁹ a potential nonviolent offender is likely to be less concerned about apprehension than the potential violent offender because arrest rates for nonviolent crimes are much lower.²⁶⁰ More importantly, there is no basis to believe that potential offenders would envision receiving a life without parole sentence for nonviolent offenses because even among those individuals apprehended, very few actually end with this punishment. The sentence’s rarity—it’s imposition in some microscopic percentage of nonviolent cases²⁶¹—undermines its ability to deter.²⁶²

On the whole, deterrence may provide some support for the challenged sentencing practice, but that support is underwhelming. Standing

256. Nagin, *supra* note 253, at 201.

257. *See id.* at 201–02 (“[T]he evidence in support of certainty’s deterrent effect pertains almost exclusively to apprehension probability.”).

258. *Id.* at 202.

259. *See* Paternoster, *supra* note 255, at 804 (“There is evidence that would-be offenders are not completely unmindful of the objective risks and costs they run if they commit crimes, but the correlations are rather meager and must be disappointing to believers in deterrence.”).

260. *See, e.g., Crime in the United States: Clearances*, FED. BUREAU OF INVESTIGATION (2013) https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/clearances/clearancetopic_final [http://perma.cc/BX8A-GGHC] (“In the nation in 2013, 48.1 percent of violent crimes and 19.7 percent of property crimes were cleared by arrest or exceptional means.”).

261. *See supra* Part III.A.3 (explaining that certainty of apprehension is what provides deterrent effects to offenders).

262. *Graham v. Florida*, 560 U.S. 48, 72 (2010) (noting that individuals are less likely to take the punishment into consideration when making decisions to offend “particularly . . . when that punishment is rarely imposed”).

alone, it seems that the deterrence rationale for sentencing nonviolent offenders to life without parole sentences “does not overcome other objections”²⁶³ Therefore, the Court must decide what it makes of the other penological justifications as well.

b. Retribution

Retribution describes the theory that punishment can be valid if the state uses it to ensure that an individual who commits a wrong gives up something—for example, freedom—in return. On this theory, the offender deserves to be punished because he has harmed a victim or society. The Court has described the “goal of retribution” as fulfilling “society’s and the victim’s interests in seeing that the offender is repaid for the hurt he caused.”²⁶⁴

Imposing life without parole sentences on individuals who have committed nonviolent offenses takes retribution beyond its breaking point. Retribution relies on the idea that an “offender receive exactly the amount of punishment he deserves for the crime committed, and receive no more or no less.”²⁶⁵ It is difficult to imagine that our society countenances the notion that someone should be locked up forever without the possibility of release because she committed a crime that did no direct harm to another person. Therefore, “there are certainly some crimes that, particularly . . . nonviolent crimes, may not be justifiable for Eighth Amendment purposes by the penological goal of retribution.”²⁶⁶ As the Court has put it, “[r]etribution is a legitimate reason to punish, but it cannot support the sentence at issue here.”²⁶⁷

c. Rehabilitation

Rehabilitation refers to the penological goal of treating and training offenders so that they can effectively reintegrate into society and become law-abiding individuals. It is premised on the theory that some

263. *Kennedy v. Louisiana*, 554 U.S. 407, 441 (2008).

264. *Id.* at 442.

265. *Berry III*, *supra* note 162, at 1135.

266. *Id.* at 1136.

267. *Graham*, 560 U.S. at 71; *see also* *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (“Putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts.”). Indeed, it appears the Court has questioned retribution’s validity or at least indicated that it is the least persuasive penological justification because it is the one “that most often can contradict the law’s own ends.” *Kennedy*, 554 U.S. at 420. “When the law punishes by death” and other extremely harsh punishments, “it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.” *Id.*

causes of criminal behavior can be addressed. As far as the life without parole punishment is concerned, rehabilitation is not and could not be a goal. “A sentence of life imprisonment without parole . . . cannot be justified by the goal of rehabilitation. The penalty forswears altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person’s value and place in society.”²⁶⁸ As one commentator put it: “Life without parole, by definition, is a judgment that an individual cannot be rehabilitated.”²⁶⁹

d. Incapacitation

Incapacitation represents the concept that crimes can be prevented by physically removing offenders from society and thereby curtailing their opportunities to commit further crimes. It turns on the assumption that the incarcerated offender, if free, would engage in more criminal activity. Policymakers often rely upon incapacitation as the key tool for reducing recidivism.²⁷⁰

The Supreme Court has recognized that incapacitation can be a powerful justification for some harsh sentencing regimes. In *Ewing*, the Court noted that “[r]ecidivism is a serious public safety concern . . . throughout the Nation.”²⁷¹ In terms of addressing that concern, “it is hard to dispute the efficacy of imprisonment: those in prison don’t commit any new crimes except against guards and other inmates, and so by extending the periods of imprisonment . . . we extend the period where the inmate cannot re-offend.”²⁷² Though there are clear societal and public safety benefits to keeping individuals likely to engage in more criminal activity behind bars,²⁷³ there are also substantial costs and concerns – many of which are now being raised and discussed by lawmakers around the country.

268. *Graham*, 560 U.S. at 74.

269. Berry III, *supra* note 162, at 1135. In fact, “[a]s a matter of policy, some prisons categorically deny drug treatment, counseling, vocational and educational programs, and other rehabilitative services to prisoners who are sentenced to die in prison and are ineligible for parole. Other prisons limit LWOP prisoners’ access to such rehabilitative services on account of their sentences.” TURNER & BUNTING, *supra* note 4, at 189.

270. Andrew D. Leipold, *Recidivism, Incapacitation, and Criminal Sentencing Policy*, 3 U. ST. THOMAS L.J. 536, 541 (2006) (“[O]ne simple explanation for the increasing prison population is that incapacitation works.”).

271. *Ewing v. California*, 538 U.S. 11, 26 (2003).

272. Leipold, *supra* note 270, at 542.

273. *See id.* at 543 (“[T]he best reading of the data suggests that former inmates in general re-offend at high rates.”).

When a court hands down a life without parole sentence, that sentence represents a “determination that the individual *will always* be dangerous to society.”²⁷⁴ These determinations are often problematic because “incontrovertible scientific evidence demonstrates that future dangerousness determinations are, at best, wildly speculative.”²⁷⁵ When sentencers get it wrong, there is no recourse. At no point will any judicial or executive body be asked to revisit the initial assessment because there is no opportunity at all for parole. Life without parole sentences also prove insensitive to the reality that recidivism rates decline as offenders get older.²⁷⁶ For this reason, it is “quite doubtful . . . whether such a long and inflexible sentence as LWOP can ever be justified on incapacitation grounds, given the very low recidivism rates of elderly ex-convicts.”²⁷⁷

Particularly in the context of individuals convicted of nonviolent offenses, the financial costs of lifetime incarceration may outweigh the risks that come with less severe term-of-year sentences or even the mere possibility of paroling an inmate who has served some significant amount of time. “Keeping the elderly and infirm in prison is extraordinarily costly.”²⁷⁸ And, though there are costs on the other side (for example, the economic costs of additional crimes committed by released offenders), the marginal incapacitative benefit of denying individuals the opportunity to even seek parole seems slim.

As the Court recognized in *Ewing* and again in *Graham*, incapacitation is “an important goal.”²⁷⁹ It is also a goal that is undoubtedly achieved when someone is sentenced to die in prison; that individual will never commit a crime outside of the prison walls again. But, achieving that goal comes at a great cost. It means denying outright the possibility of release to many individuals who would not commit another crime or who will be rehabilitated. And, it means reaffirming the idea that nonviolent crimes can warrant an extraordinarily harsh punishment just short of the death penalty. While incapacitation

274. Berry III, *supra* note 162, at 1132.

275. *Id.*

276. See, e.g., Jamie Fellner, *Graying Prisoners*, N.Y. TIMES (Aug. 18, 2013), <http://www.nytimes.com/2013/08/19/opinion/graying-prisoners.html> [<http://perma.cc/FPP6-MF99>] (“Recidivism studies consistently show declining rates of crime with age.”); Leipold, *supra* note 270, at 555 (“An astonishing 82% of those inmates who are released at age 14-17 are likely to be re-arrested, while fewer than half (45%) of those age 45 and above will be.”).

277. O’Hear, *supra* note 27, at 1135.

278. Fellner, *supra* note 276.

279. *Graham v. Florida*, 560 U.S. 48, 72 (2010).

can plausibly provide a partial justification for life without parole sentences imposed for nonviolent offenses, it alone cannot withstand the weight of the Eighth Amendment challenge in light of the other concerns such sentences raise.

4. International Opinion

In its independent judgment analysis, the Court sometimes considers how other countries approach the challenged punishment. This factor—the status of international opinion—is never “controlling” of the “outcome,” but it “does provide respected” input for the Court’s “own conclusions.”²⁸⁰ Where the Court has found a punishment unconstitutional under its Eighth Amendment categorical analysis, it “has treated the laws and practices of other nations and international agreements as relevant . . . because the judgment of the world’s nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court’s rationale has respected reasoning to support it.”²⁸¹

On the question of life without parole sentences, the international community appears to have largely rejected the punishment, especially for nonviolent offenses. According to the ACLU:

Today, the United States is virtually alone in its willingness to sentence nonviolent offenders to die behind bars Such sentences are rare in other countries and were recently ruled a violation of human rights in a landmark decision by the European Court of Human Rights that would require an opportunity for review of the sentences of 49 prisoners serving LWOP (for murder) in the United Kingdom—one of only two countries in Europe that still sentence prisoners to LWOP.²⁸²

Moreover, the Rome Statute, which has been signed by almost 100 nations, requires that life sentences for all crimes, including the most violent ones, be subject to review after twenty-five years.²⁸³ There are no readily available figures detailing the number of individuals under sentence of life without parole for nonviolent offenses, but only about twenty percent of countries use life without parole at all, and of those

280. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

281. *Graham*, 560 U.S. at 82.

282. TURNER & BUNTING, *supra* note 4, at 11; *see also* O’Hear, *supra* note 27, at 1127 (“[M]ost European nations have rejected LWOP as a sentencing option and those that permit the sentence use it quite sparingly”).

283. *See, e.g.*, TURNER & BUNTING, *supra* note 4, at 200 (explaining that the United States is not among the 100 countries that have signed the Rome statute).

a majority only imposes it for violent offenses in limited circumstances.²⁸⁴

The international opinion factor does not clearly establish universal disapproval of the punishment, but it points toward a widespread rejection. The factor here plays a role similar to the one it played in *Graham*. There, the Court found that “only 11 nations authorize life without parole for juvenile offenders under any circumstances; and only 2 of them [including the United States] . . . ever impose the punishment in practice.”²⁸⁵ So, even where the evidence of international consensus is not as powerful as it was in *Simmons*—where the U.S. was “the only country in the world that continue[d] to give official sanction” to the challenged practice—the factor can still confirm an independent judgment that life without parole is an excessive punishment for nonviolent offenses.²⁸⁶

CONCLUSION

This Article put into context and evaluated the claim that society’s evolving standards of decency make life without the possibility of parole sentences for nonviolent offenses unconstitutional under the Eighth Amendment. The historical backdrop for this severe sentencing practice is one in which there was a widespread fear of drugs and politicians perceived that they had to appear tough on crime to win and retain their elected positions. Caught up in a web of various sentencing policies—including mandatory minimums, habitual offender laws, and three strikes regimes—some 3,000+ offenders were sentenced to life without the possibility of parole even though the crime for which they were convicted did not entail any violence. As legislators at the federal and state levels as well as the President and governors move away from exceptionally harsh sentencing practices, especially for drug offenses and less serious crimes, these offenders’ sentences appear more and more out of step with contemporary punishment norms. State laws, actual sentencing practices, and the steady movement away from policies like mandatory minimums demonstrate that there is an emerging national consensus against life without parole for nonviolent offenses. If the Court continues to employ its categorical Eighth Amendment approach when a challenge to a punishment is based on the nature of the offense, there is substantial persuasive evidence both of a national consensus and that the Court’s independent judgment should move it to strike down the sentencing practice.

284. *See id.* (demonstrating that, by imposing life without parole sentences for crimes other than murder, the United States is virtually alone amongst Western democracies).

285. *Graham*, 560 U.S. at 80.

286. *Roper v. Simmons*, 543 U.S. 551, 575 (2005).